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No. 88-

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1988

DOROTHY WILLNER,

Petitioner,

vs.

UNIVERSITY OF KANSAS, GENE BUDIG, ARCHIE R. DYKES, DELBERT M. SHANKEL, FRANCES D. HOROWITZ, ROBERT P. COBB, DEANELL TACHA, ROBERT L. LINEBERRY, ROBERT S. HOFFMAN, ROBERT J. SQUIER, ANTA MONTET-WHITE, ALFRED E. JOHNSON, MICHAEL CRAWFORD, JOHN M. JANZEN, F. ALLAN HANSON, FELIX MOOS, DAVID FRAYER, ROBERT J. SMITH, DONALD STULL,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

DOROTHY WILLNER
Pro Se
2112 Terrace Road
Lawrence, Kansas 66044
(913) 843-4442

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

QUESTIONS PRESENTED

1. Is a District Court Judge obligated to disqualify himself under 28 U.S.C. § 455 in an action against a university of which he was (1) a director of the Alumni Association, (2) President of the Board of Governors of its Law School during the pendency of the action in his court, and (3) a director of the university's Endowment Association?

2. May Courts of Appeals or District Courts read into 28 U.S.C. § 455 a timeliness requirement which Congress deliberately refrained from including in the statute?

3. Does a Court of Appeals abuse its discretion by authorizing dismissal under F.R.Civ.P. 37 in violation of the First Amendment right to freedom of religion and in direct conflict with decisions of this Court?

   (Note: Petitioner reserves the right to argue Questions 4 and 5 in the event certiorari is granted on any of the above questions, but does not include Questions 4 and 5 among the reasons for the grant of certiorari).

4. Do pervasive bias and prejudice in comments and rulings constitute bias against a party sufficient to disqualify a judge?

5. Does a federal court of appeals abuse its discretion in authorizing, in conflict with the applicable decision of this Court in *Hughes v. Rowe*, 449 U.S. 5, 101 S.Ct. 173, 66 L.Ed.2d (1980), a district court's award of attorneys' fees to prevailing defendants in a civil rights action brought by a pro se plaintiff?

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The petitioner Dorothy Willner respectfully prays that a writ of certiorari issue to review the judgments and opinions of the United States Court of Appeals for the Tenth Circuit, entered in the above-entitled proceeding on June 1, 1988.

OPINIONS BELOW

The opinions of the Court of Appeals for the Tenth Circuit are reported at 848 F.2d 1023 and 848 F.2d 1032 and are reprinted in the appendix hereto, p. A1, *infra,* and p. A18, *infra.*

The memorandum decisions of the United States District Court for the District of Kansas (Rogers, D.J., Saffels, D.J.) have not been reported. They are reprinted in the appendix hereto, p. A26, *infra;* p. A30, *infra;* p. A34, *infra;* p. A68, *infra;* p. A82, *infra;* and p. A88, *infra.*

JURISDICTION

The United States District Court for the District of Kansas had jurisdiction of the claims under 42 U.S.C. §§ 1981, 1983, 1985, 1986, 1988, 2000e, *et seq.* (Title VII); 28 U.S.C. §§ 1331, 1337, 1343; the Equal Pay Act of 1963, 29 U.S.C. § 206(d); Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681, *et seq.;* the First, Fifth and Fourteenth Amendments of the Constitution, except to the extent that issues herein may operate to remove jurisdiction. On October 15, 1984, the District Court dismissed individual respondents Dykes, Shankel, Horowitz, Cobb, Hoffman, Squier, Montet-White, Moos, Janzen, Crawford, Frayer, Stull. See p. A26, *infra.* On December 6, 1984, the District Court ruled that this dismissal was not a final judgment. See p. A30, *infra.* On September 16, 1986, the District Court found for the respondent University of Kansas. See p. A34, *infra.* On January 6, 1987, the District Court granted respondents Budig's, Tacha's, Lineberry's, Johnson's, Hanson's and

Smith's motion for summary judgment on petitioner's claim under 42 U.S.C. § 1983. See p. A68, *infra*. On February 10, 1987, the District Court granted these respondents' motion for summary judgment on petitioner's remaining claims against these defendants. See p. A82, *infra*. On April 29, 1987, the District Court granted these respondents' application for attorneys' fees. See p. A88, *infra*.

On petitioner's appeals, the Tenth Circuit on June 1, 1988, entered judgments and opinions affirming. See p. A1, *infra* and p. A18, *infra*. The Court of Appeals denied timely petitions for rehearing on August 18, 1988, and entered them on August 19, 1988. See p. A92, *infra;* p. A93, *infra;* p. A94, *infra;* and p. A95, *infra*.

The jurisdiction of this Court to review the judgments of the Tenth Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

28 U.S.C. § 455 provides in pertinent part:

> (a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b) He shall also disqualify himself in the following circumstances:
>
> > (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
>
> * * *

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person;

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

* * *

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

* * *

(e) No justice, judge, or magistrate shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

F.R.Civ.P. 37(b) provides in pertinent part:

(2) *Sanctions by Court in which Action is Pending.* If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit

discovery, including an order made under subdivision (a) of this rule . . . the court in which the action is pending may make such orders in regard to the failure as are just, and among others are the following:

* * *

(C) An order striking out pleadings or parts thereof, of staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

* * *

STATEMENT OF THE CASE

Petitioner has been a faculty member of the University of Kansas in anthropology since 1966, first as an associate professor of anthropology and, since 1970, as a full professor. Petitioner filed suit by counsel in the United States District Court for Kansas (Rogers, D.J.) on December 1, 1982, pursuant to 42 U.S.C. §§ 1981, 1983, 1985, 1986, 2000e, *et seq.* (Title VII); 29 U.S.C. § 206(d), the Equal Pay Act; Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681, *et seq.*; and the First, Fifth and Fourteenth Amendments, on the basis of an EEOC determination of reasonable cause which stated:

> In May 1977, Charging Party did protest an action which she felt violated appropriate civil rights statutes and internal provisions. While failing to prevail in her actions, there is no evidence that her actions were of such a nature so as to lose the protection afforded by Title VII. In the instant case evidence did establish that Charging Party was heat-

> edly attacked by others in the department and those individuals were to subsequently assume responsibility for determining Charging Party's salary . . .
>
> Evidence establishes that from 1977 to the present there has been a marked decline in Charging Party's relative standing in the department on the basis of salary. The Commission's investigation disclosed that there appeared to be a manipulation of Charging Party's ratings as well as a general undervaluing of her accomplishments. Accordingly, there is a reasonable basis to credit the sex and retaliation allegation regarding salary . . .
>
> There was evidence establishing a reasonable cause to credit the retaliation allegation on the harassment . . . .

Petitioner's complaints against the University and individual defendants alleged discrimination on the grounds of sex in salary, verbal abuse and harassment at departmental meetings and otherwise, causing loss of Fulbright research grants, and slandering and demeaning her to students, faculty and others.

Disqualification of Judge

Throughout the pendency of petitioner's action before Judge Rogers, he failed to disclose to her his close personal ties to respondent University of Kansas. These included having been a Director of its Alumni Association while her charges were before the EEOC, having been President of the Board of Governors of the University's Law School while petitioner's case was before him, and having been a Director of the University's Endowment

Association. He had been awarded a prize by the University's Law School in 1979.

Petitioner's first counsel withdrew on June 1, 1983, after irregularities. While acting pro se, petitioner first learned that Judge Rogers had been a Director of the University's Alumni Association in 1981 and was thereby subject to disqualification. Promptly, in October 1983, petitioner filed a motion for disqualification pursuant to 28 U.S.C. § 455(a) and (b).

Judge Rogers orally denied petitioner's motion on July 23, 1984, during a telephone call initiated by respondents' counsel. See pp. A96, A97, *infra*. In an order dated August 30, 1984, Judge Rogers stated:

> I do not believe that my past association with the Alumni Association demonstrates actual bias under the circumstances of this case and I do not think that a reasonable man would doubt my impartiality under these circumstances . . . I do not think my association with the Alumni Association is nearly as significant as other associations which have been found by various courts not to require recusal.

He failed to state that he had held the position of President of the Board of Governors of the Law School of the University after petitioner's case had been filed.

Petitioner learned in December 1984 that Judge Rogers had been President of the Board of Governors of the Law School. She petitioned timely for a writ of mandamus pursuant to 28 U.S.C. § 455(a) and § 455(b)(1) as well as § 144. Judge Rogers refused to recuse himself and the Court of Appeals for the Tenth Circuit dismissed her petition for mandamus on March 27, 1985, "without

prejudice to the right of petitioner to raise the issue sought to be raised in this petition by direct appeal from a final judgment."

In September 1986, a week after Judge Rogers found for respondent University of Kansas, petitioner learned that Judge Rogers was also a Director of the University's Endowment Association. See p. A136, *infra*.

Dismissal in Contravention of Petitioner's First Amendment Rights

Judge Rogers dismissed individual defendants from petitioner's suit on October 15, 1986 under circumstances which denied petitioner her First Amendment right to observe the High Holy Days of the Jewish Faith. See p. A103, *infra*. On August 10, 1984, the individual respondents filed a motion to dismiss on the ground that petitioner had not met an order filed March 5, 1984, to provide more complete and detailed answers to interrogatories. When they filed this motion, both they and the Court knew that petitioner had been unable to meet the order because, on March 9, 1984, new counsel agreed to represent her and, on March 13, 1984, took possession of her documents. Petitioner's documents remained in the possession of withdrawing counsel or of counsel to whom petitioner was referred almost continuously until July 11, 1984. See pp. A113-A117, *infra*. Respondents began deposing petitioner a week after she retrieved her documents and they continued to depose her after they filed their motion to dismiss.

On September 18, 1984, Judge Rogers held a hearing on respondents' motion during which petitioner informed

him that she is a religious Jew and that the solemn Jewish High Holy Days were approaching. Nonetheless, Judge Rogers ordered her on September 19, 1984, to supply more complete and detailed answers to five of the interrogatories within but ten days. On September 21, before receipt of this order, petitioner filed a motion which stated with specificity that the Jewish High Holy Day period was scheduled to begin on September 26, 1984, and continue until October 7, 1984. See p. A99, *infra*. On September 24, 1984, upon receipt of the Court's order, petitioner immediately moved for a ten day extension to meet it on the ground that Rosh HaShana, the Jewish New Year, fell on September 26 through September 28, 1984, followed by Yom Kippur, the Day of Atonement, on October 6, 1984, and that her religious obligations on those days and the Sabbath between them prohibited her from all work during those four days.

Petitioner also immediately began complying with the order and complied within ten days plus the four days covered by the Jewish High Holy Days. She also filed Certificates of Compliance with the District Court. See pp. A105-A109, *infra*.

Nonetheless, on October 15, 1984, Judge Rogers denied petitioner's motion for an extension and dismissed her claims against the individual defendants for "willful failure to cooperate in the discovery process." See p. A28, *infra*. Judge Rogers not only denied a petition for reconsideration but also refused to certify his order of October 15, 1984, for appeal. See pp. A101, A31-A33, *infra*. Petitioner timely filed an affidavit of prejudice pursuant to 28 U.S.C. § 144.

Petitioner filed her second suit pro se because the District Court, on March 6, 1984, had denied her motion to amend pursuant to F.R.Civ.P. 15(a). On November 25, 1985, the District Court (Saffels, D.J.) found respondents' unsupported allegation that petitioner suffers "mental infirmities" to be "perfectly proper." See pp. A151, A158, *infra*.

Respondents in the second suit moved for summary judgment on October 27, 1987. Judge Saffels, denying petitioner's motion for a 30 day extension, ordered her to respond within ten days. She complied. On January 6, 1987, he granted summary judgment, under the doctrine of res judicata and collateral estoppel, on petitioner's claims under § 1983. He asserted that the nonmoving party must go beyond the pleadings, although petitioner had filed voluminous evidence, including sworn statements, as exhibits to pleadings. He granted summary judgment on petitioner's claim under Title IX, denying a private right of action, and ordered her to respond within fifteen days on her remaining claims. After she did so, he granted summary judgment on all of them and also denied her motion for disqualification on the ground of pervasive bias and prejudice. See pp. A152, A153, *infra*. He subsequently granted respondents' counsel attorneys' fees. See p. A90, *infra* and p. A148, *infra*.

In her appeals of the District Court's grant of summary judgment and award of attorneys' fees, petitioner invoked F.R.Civ.P. 60(b) for relief from all the judgments of the District Court.

REASONS FOR GRANTING THE WRIT

I.

The decision of the Tenth Circuit not to disqualify the District Judge conflicts with (a) decisions of this Court, and (b) 28 U.S.C. § 455.

In *Liljeberg v. Health Services Corp.*, 108 S.Ct. 2194, 100 L.Ed.2d 855, this Court held at 866:

> . . . the Court of Appeals for the Fifth Circuit concluded that a violation of § 455(a) is established when a reasonable person, knowing the relevant facts, would expect that a justice, judge, or magistrate knew of circumstances creating an appearance of partiality . . . We granted certiorari to consider its construction of § 455(a) as well as its remedial decision. 480 U.S. ....., 94 L.Ed.2d 684, 107 S.Ct. 1368. We now affirm.

In their dissenting opinion, Chief Justice Rehnquist, joined by Justice White and Justice Scalia, further stated at 879:

> Subsection (a) was drafted to replace the subjective standard of the old disqualification statute with an objective test. Congress hoped that this objective standard would promote public confidence in the impartiality of the judicial process by instructing a judge, when confronted with circumstances in which his impartiality could reasonably be doubted, to disqualify himself . . .

This Court decided *Liljeberg* on June 17, 1988, when this case still was pending before the Tenth Circuit.

The conflict between *Liljeberg* and this case could not be more complete. It is indisputable that Judge Rogers knew he had been President of the Board of Governors of the Law School of respondent University of Kansas during the pendency of this case before him when he refused to recuse himself because of having been a Director of respondent University's Alumni Association. Nonetheless, he failed to seek waiver "preceded by a full disclosure on the record of the basis for disqualification" pursuant to § 455(e).

Judge Rogers also knew that he had been a Director of respondent University's Endowment Association when he refused to recuse himself. A substantial part of respondent University's income—e.g., nearly $13.9 million during 1984-85 and $15.2 million during 1986-87—is contributed through its Endowment Association. In *Ward v. Village of Monroeville, Ohio,* 409 U.S. 57, 93 S.Ct. 80, 34 L.Ed.2d 267 (1972), this Court held that it is not necessary for a judge to share directly in a level of contribution to have a direct, personal, substantial pecuniary interest in a case before him. In *Gibson v. Berryhill,* 411 U.S. 564, 93 S.Ct. 1698, 36 L.Ed.2d 488 (1973), this Court held that the disqualifying financial stake need not be "direct or positive." As the Seventh Circuit held in *United Church, Etc. v. Medical Center Com'n,* 689 F.2d 693, 700 (1982),

> . . . the principle of disqualification applies even if the pecuniary interest is only an indirect outgrowth of a public official's desire to protect official funds.

Judge Rogers' refusal to disqualify himself deprived petitioner of her right to due process under the standard

of *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942 (1955). This Court stated in *Murchison*:

> A fair trial in a fair tribunal is a basic requirement of due process. Fairness, of course, requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases in which he has an interest in the outcome.

In upholding Judge Rogers' refusal to have disqualified himself, the Tenth Circuit has created a precedent directly at odds with this Court's rulings as well as with 28 U.S.C. § 455.

II.

The decision of the Tenth Circuit not to disqualify the District Judge conflicts with (a) 28 U.S.C. § 455 by reading into that statute a timeliness requirement which Congress deliberately failed to include, (b) decisions in other Circuits, and (c) this Court's decision in Liljeberg, supra.

This case presents an important issue of statutory construction of 28 U.S.C. § 455 concerning which there is a conflict among the Circuits (which does not appear to have been resolved by *Liljeberg, supra*). The issue is whether courts can impose a timeliness requirement on a motion for judicial disqualification pursuant to this statute. The Tenth Circuit has held in this case that such a motion "must be timely filed." See p. A9, *infra*. It has thereby claimed as mandatory a requirement that was specifically disclaimed by Congress in the 1974

amendment to 28 U.S.C. § 455. The legislative history of that act makes it clear that there is no particular procedure which must be followed by a party in order to obtain judicial disqualification and that Congress deliberately disregarded attempts to apply requirements such as timeliness. *See Roberts v. Bailar*, 625 F.2d 125, 128 (6th Cir. 1980); *See* also *Delesdernier v. Porterie*, 666 F.2d 116, 120-121 (5th Cir. 1982).

Other circuits have recognized the absence of procedural requirements in this statute. The Seventh Circuit has held that there are no time limits within which disqualification must be sought. *See SCA Services, Inc. v. Morgan*, 557 F.2d 110, 117 (7th Cir. 1977). The Ninth Circuit has also held that § 455 sets forth no procedural requirements. *See United States v. Sibla*, 624 F.2d 864, 867 (9th Cir. 1980). Of the decisions in cases in four circuits other than its own cited by the Tenth Circuit in support of its holding on timeliness, those from two other circuits recognize that § 455 has no timeliness requirement. *See In re International Business Machines Corp.*, 618 F.2d 923, 932 (2nd Cir. 1980) and *Oglala Sioux Tribe v. Homestake Mining Co.*, 722 F.2d 1407, 1414 (8th Cir. 1983).

Despite their recognition of the absence of a timeliness requirement in the statute, some circuits have chosen to insert one or to see one as implicit. *See In re International Business Machines Corp., supra; Oglala Sioux Tribe v. Homestake Min. Co., supra.* Other circuits have ignored the disinclination of Congress to include a timeliness requirement in the statute and have chosen to treat § 455 as if it were identical to § 144 which has a timeliness requirement. *See United States v. Slay*, 714 F.2d 1093, 1094 (11th Cir. 1983).

In two prior cases in the two years immediately preceding this one, *Franks v. Nimmo*, 796 F.2d 1230, 1234 (1986) and *Hinman v. Rogers*, 831 F.2d 937, 939 (1987), the Tenth Circuit held that § 455 contains no procedural hurdles. This gives rise to the inference that the holding in this case of a procedural requirement of timeliness has the purpose of avoiding ruling on the merits of petitioner's motions pursuant to § 455. This inference is supported by the Tenth Circuit's denial of petitioner's petition for rehearing in the light of this Court's decision in *Liljeberg, supra*. For if timeliness were a requirement pursuant to § 455, petitioner met it, since she did timely file her motion for disqualification on the basis of the district court's position as director of the Alumni Association of respondent University of Kansas. She filed this motion directly after learning of this relationship of the District Court Judge to the University.

In the cases where circuit courts have read a timeliness requirement into § 455, there has been disarray over the standard or criterion to be applied. For example, the Fifth Circuit and the Eleventh Circuit apply the test of when a party seeking disqualification receives knowledge of the facts appearing to warrant disqualification. *See Health Services Acquisition Corp. v. Liljeberg*, 796 F.2d 796 (5th Cir. 1986), *United States v. Slay, supra*. The Tenth Circuit applies the test of when the case is filed. *See Singer v. Wadman*, 745 F.2d 606, 608 (10th Cir. 1984).

The disarray in the circuits on both timeliness and the proper interpretation of the statute calls for this Court's consideration.

III.

The decision of the Tenth Circuit to authorize dismissal of individual defendants pursuant to F.R.Civ.P. 37(b) after the plaintiff in good faith made diligent efforts to comply with the District Court's order to supplement interrogatories within ten days and succeeded in doing so within ten calendar days after receiving the Court's order plus four days of religious observance including the High Holy Days of the Jewish faith conflicts with (a) a legitimate claim to the free exercise of religion, and (b) decisions of this Court.

Observance of the Jewish High Holy Days of Rosh HaShana and Yom Kippur, with their prohibition on all work and their dedication to prayer and repentance, is an integral part of Judaism. Any governmental action which can restrict a practicing Jew's observance of the High Holy Days and a Sabbath between them necessarily creates a burden on the exercise of a Jewish person's religion.

Petitioner fully met the District Court's order to provide complete and detailed answers to five interrogatories within ten days, as ordered, under the provisions of F.R.Civ.P. 6(a) and (e) as of 1984, absent the four days she observed Rosh HaShana, Yom Kippur and the Sabbath between them.

The conflict between this Court's decisions in *Sherbert v. Verner*, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963) and in *Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972) and the instant case could not be more complete. In *Sherbert v. Verner*, the Supreme Court held at 967 that:

> Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation of religious freedom; no showing merely of a rational relationship to some colorable state interest will suffice.

In *Yoder*, this Court held at 207:

> The essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion.

Nonetheless, in his order of October 15, 1984, dismissing individual defendants, Judge Rogers failed to meet this standard. See p. A28, *infra*. Instead, he stated:

> The Court does not find that plaintiff has shown good cause for the extension of the deadline established in our order of September 19, 1984.

The District Court further stated:

> Plaintiff's actions can only be characterized as a willful failure to cooperate in the discovery process.

To characterize petitioner's religious observance as a willful failure to cooperate in the discovery process strikes at the legitimacy of Jewish religious practice without even an attempt to assert an overriding interest.

In authorizing the District Court's dismissal of individual defendants pursuant to Rule 37(b) as a final order, the Tenth Circuit not only struck at the legitimacy of Jewish religious practice; it also is in direct conflict with the decisions of this Court in *Societe Internationale v. Rogers*, 357 U.S. 197, 78 S.Ct. 1097, 2 L.Ed.2d 1255 (1958)

and *National Hockey League v. Metropolitan Hockey Club,* 427 U.S. 639, 640, 642, 96 S.Ct. 2778, 2782, 49 L.Ed.2d 747, 751 (1975). *Societe Internationale* held that Rule 37

> . . . should not be construed to authorize dismissal of a complaint because of the plaintiff's noncompliance with a pretrial production order when it has been established that failure to comply has been due to inability, and not to willfulness, bad faith, or any fault of the plaintiff.

National Hockey League upheld this standard.

The record in this case in District Court establishes that petitioner was unable to comply with the District Court's order of March 5, 1984, compelling further answers to respondents' interrogatories because, on March 9, 1984, petitioner retained counsel who took possession of the documents necessary to answer respondents' interrogatories and failed to allow petitioner to recover them until May 25, 1984. The record establishes that counsel whom petitioner sought to have represent her took possession of her documents on June 1, 1984, and held them until July 11, 1984. The record establishes that petitioner in good faith gave the information requested in respondents' interrogatories during deposition duces tecum between July 18, 1984 and August 16, 1984. See pp. A111-A118, *infra.* The record establishes that there has been no willfulness, bad faith, or any fault of petitioner.

The importance of the issues presented by the Tenth Circuit's authorization as a final order of the District Court's dismissal of individual defendants pursuant to Rule 37(b) extends beyond the parties and beyond the Tenth Circuit. The issues presented are important to the administration of justice.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

DOROTHY WILLNER
Pro Se
2112 Terrace Road
Lawrence, Kansas 66044
(913) 843-4442

88-951

No. 88-

Supreme Court, U.S.
FILED
NOV 16 1988
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1988

DOROTHY WILLNER,
Petitioner,

vs.

UNIVERSITY OF KANSAS, GENE BUDIG, ARCHIE R. DYKES, DELBERT M. SHANKEL, FRANCES D. HOROWITZ, ROBERT P. COBB, DEANELL TACHA, ROBERT L. LINEBERRY, ROBERT S. HOFFMAN, ROBERT J. SQUIER, ANTA MONTET-WHITE, ALFRED E. JOHNSON, MICHAEL CRAWFORD, JOHN M. JANZEN, F. ALLAN HANSON, FELIX MOOS, DAVID FRAYER, ROBERT J. SMITH, DONALD STULL,
Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

DOROTHY WILLNER
Pro Se
2112 Terrace Road
Lawrence, Kansas 66044
(913) 843-4442

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

1627P

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(Filed June 1, 1988)

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 86-2678

DOROTHY WILLNER,
Plaintiff-Appellant,

v.

UNIVERSITY OF KANSAS,
Defendant-Appellee.

Appeal from the United States District Court
for the District of Kansas
Richard D. Rogers, District Judge, Presiding
(D.C. No. 82-4291)

Dorothy Willner, Pro se, Plaintiff-Appellant.

Rose Marino, Associate General Counsel, University of Kansas; J. Steven Pigg, Fisher, Patterson, Sayler & Smith, Topeka, Kansas; Clifford T. Mueller and Douglas M. Greenwald, McAnany, Van Cleave & Phillips, Lenexa, Kansas, for Defendants-Appellees.

Before: WRIGHT, ALARCON, and HALL, Circuit Judges.*

*Honorable Eugene A. Wright, Honorable Arthur L. Alarcon, and Honorable Cynthia Holcomb Hall, Circuit Judges, United States Court of Appeals for the Ninth Circuit, sitting by designation.

Per Curiam.

Dorothy Willner appeals from the judgment for the defendants after a bench trial in this sex discrimination action. She makes the following contentions on appeal.

(1) The district judge erred in refusing to recuse himself from presiding over the case.

(2) The district court erred when it dismissed her claims against the individual defendants prior to trial because of her failure to comply with an order compelling her to answer interrogatories.

(3) The district court's factual findings were clearly erroneous.

I

PERTINENT FACTS

Dorothy Willner, a professor of anthropology at the University of Kansas, filed this action naming as defendants the University of Kansas and twelve individuals who either were or had been University Chancellor, Dean of the College of Liberal Arts and Sciences, anthropology department chairpersons, or professors in the anthropology department (collectively individual defendants). She alleged the defendants had denied her equal pay, verbally abused her, harassed her, caused her to lose a Fulbright research grant, falsely evaluated her with regard to salary increases, deliberately failed to display a book that she had written, and slandered her to students, faculty, and others. She claimed the defendants discriminated against her because she is female and Jewish. She sought relief pursuant to 42 U.S.C. §§ 1981, 1983, 1985, 1986, 1988; Title VII, 42 U.S.C. § 2000(e); the Equal Pay Act (EPA), 29

U.S.C. § 206(d); Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681; and the first, fifth, and fourteenth amendments.

Willner's attorney was granted leave to withdraw shortly after the complaint was filed. Willner appeared pro se throughout the course of the lawsuit. During pretrial proceedings, all of Dorothy Willner's claims were dismissed, except for the Title VII and the EPA claims against the University of Kansas. In May 1986, a bench trial was held on the remaining claims. The district court entered judgment for the University of Kansas. Willner appeals from the judgment.

II

PROPRIETY OF RECUSAL ISSUES

Dorothy Willner moved for the recusal of Judge Richard D. Rogers on several grounds at various stages of the proceedings. She claims that recusal was warranted on the following grounds:

1. Judge Rogers' demeanor in a separate sex discrimination action filed against the University of Kansas by her sister suggested bias against all similarly situated females.

2. Judge Rogers had made statements evincing a bias against women employees who filed actions against the University of Kansas.

3. Judge Rogers failed to disclose that he was related to a former defense attorney in these proceedings.

4. Judge Rogers denied her motion for an extension of time and dismissed the claims against the individual defendants because she was Jewish.

5. Judge Rogers refused to grant her a protective order to delay her deposition.

6. Judge Rogers was a director of the alumni association of the University of Kansas when she filed her complaint with the Equal Employment Opportunity Commission (EEOC).

7. Judge Rogers was aware that there was an appearance of bias because he inquired of Myra Hinman, in a separate proceeding against the University of Kansas, whether she felt he would be biased because of his close association with the University of Kansas Alumni Association.

8. Judge Rogers was the president of the Board of Governors of the law school of the University of Kansas during the pendency of this action.

9. Judge Rogers permitted her attorney to withdraw on improper grounds.

10. Judge Rogers refused to strike alleged "defamatory remarks" from her attorney's notice of withdrawal.

The denial of a motion to recuse is reviewed for abuse of discretion. *Weatherhead v. Globe International, Inc.*, 832 F.2d 1226, 1227 (10th Cir. 1987). The district court did not abuse its discretion because the recusal motions (1) failed to allege sufficient facts, (2) involved adverse rulings, or (3) were untimely.

A. *Adequacy of Factual Allegations*

On October 11, 1983, Dorothy Willner filed a motion to recuse Judge Rogers pursuant to 28 U.S.C. §§ 455(a) and 455(b)(1) (1982). She alleged, inter alia, that:

> Plaintiff pro se Dorothy Willner observed Judge Rogers' demeanor towards plaintiff pro se Ann Ruth Willner on June 8, 1983 when plaintiff pro se Ann Ruth Willner appeared before the Court. Having formed the distinct impression of personal prejudice of the Court toward plaintiff pro se Ann Ruth Willner, plaintiff pro se Dorothy Willner asks the Court to consider most carefully whether it has exhibited the full consideration due their own behalf.

This allegation was unsupported by an affidavit or declaration.

Section 455(a) requires that "[a]ny justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." Section 455(b)(1) provides that a judge must disqualify himself when "he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding."

An unsubstantiated suggestion of personal bias or prejudice is insufficient to mandate recusal under section 455(a). *United States v. Hines*, 696 F.2d 722, 729 (10th Cir. 1982). The motion fails to state any facts concerning Judge Rogers' demeanor that would "cause a reasonable man to doubt the judge's impartiality." *Id.* Under such circumstances recusal is not mandated under section 455(a). *Id.*

The October 11, 1983 motion is also insufficient to meet the requirements of section 455(b)(1). No facts were alleged that demonstrate actual bias against Dorothy Willner.

In the same motion, Dorothy Willner also alleges:

> Plaintiff has been informed that Judge Rogers was heard to make the following statement in reference to cases of sex discrimination being filed by female employees of defendant University of Kansas: "Those women over there! If they don't get the high-paying jobs they want, they holler discrimination."

This allegation is also unaccompanied by a supporting affidavit or declaration stating the source of the hearsay statement or when and where it was made. In *Hines,* this court concluded that a recusal motion that "fail[ed] to state with reasonable particularity when, where, and to whom the statement was made" did not meet the requirements of a section 455 motion. *Id.* at 729. Dorothy Willner has failed to allege facts showing actual bias. A reasonable person would not doubt a judge's impartiality on the basis of a hearsay statement from an undisclosed informer of unknown reliability. *Id.*

In a motion filed on February 7, 1986, Dorothy Willner alleged that an attorney who had appeared for the individual defendants in this action, prior to his withdrawal, was related to Judge Rogers. No evidence was offered by Dorothy Willner to support this allegation. Judge Rogers denied that he was related to any attorney who had appeared in the case. In *Hinman v. Rogers,* 831 F.2d 937, 939-40 (10th Cir. 1987) this court stated that a judge had a duty *not* to recuse himself on unsupported speculation.

B. *Attempted Recusal Based on Adverse Rulings*

Some of Dorothy Willner's challenges to Judge Rogers' rulings denying her motions for recusal are based on ad-

verse rulings of the court. On January 7, 1985, she filed a motion for recusal under 28 U.S.C. § 144 (1982). This motion was supported by an affidavit. The affidavit alleges that Judge Rogers denied her motion for reconsideration of his order granting her ten additional days to comply with a discovery order because he is personally biased against her because she is Jewish. The affidavit further states that on September 19, 1984, Judge Rogers ordered her to submit answers to five interrogatories within ten days, notwithstanding the fact that she had notified the court on September 12, 1984 that the Jewish High Holy Days of Rosh Hashanah and Yom Kippur and the Sabbath in between "were approaching." On September 21, 1984, after the court had previously granted her up to ten days to comply with the discovery order, Dorothy Willner informed the court that this religious celebration would commence on September 26, 1984.

The affidavit contained no facts that would support an inference that Judge Rogers was personally biased against Dorothy Willner because she is Jewish or for any other reason in ordering compliance with the discovery order.

Dorothy Willner was served with interrogatories on February 17, 1983. She was required to respond or object within 30 days. Fed. R. Civ. P. 33(a). She did not respond until June 30, 1983.

On August 18, 1983, the defendants moved to compel more complete and direct answers. Dorothy Willner opposed the motion on the ground that she had supplied sufficiently detailed answers. On March 5, 1984, a magistrate ordered her to supplement her answers before March 30, 1984. She failed to comply with this order.

On August 10, 1984, the individual defendants who had requested the answers to the interrogatories moved for dismissal of Willner's claims against them pursuant to Fed. R. Civ. P. 37(b)(2)(C). Rule 37(b)(2)(C) permits the court to dismiss an action when a plaintiff fails to comply with a discovery order.

On September 12, 1984, Willner claimed that certain circumstances, not of her own doing, led to her failure to supply the supplemental answers. In addition, Willner argued that she had already given complete answers to her questions in her deposition. She also informed the court, as set forth above, that the religious holidays would occur later that month. The district court held a hearing on the motion to dismiss on September 18, 1984.

Instead of granting the motion to dismiss, Judge Rogers *sua sponte* ordered her to provide supplemental answers within ten days. The court also advised her that failure to comply would result in dismissal. These facts demonstrate that the district court exercised considerable and commendable patience in the face of Dorothy Willner's failure to comply with the March 5, 1984 order to supplement her answers. In challenging the propriety of the order compelling further answers, Dorothy Willner argues that the information sought by the defendants is contained within her deposition. Assuming that this representation is accurate, Dorothy Willner had ample time to comply with the court's order prior to the commencement of her religious observances. Indeed, she expended her energies during the ten-day period filing a further motion to delay compliance with the court's order.

The allegation that Judge Rogers is personally biased against Dorothy Willner is unsupported by any facts. The court order granting her additional time to comply with discovery was well within the court's discretion. Moreover, a motion to recuse cannot be based solely on adverse rulings. *See Hamm v. Members of the Board of Regents,* 708 F.2d 647, 651 (11th Cir. 1983) (motion to recuse pursuant to sections 455 and 144); *United States v. Bray,* 546 F.2d 851, 857 (10th Cir. 1976) (motion to recuse pursuant to section 144). Under the circumstances shown by this record, the district court did not abuse its discretion in denying the motion for recusal pursuant to section 144.

C. *Untimeliness*

On several occasions, Dorothy Willner requested that Judge Rogers recuse himself on the ground that his participation in the University of Kansas alumni activities demonstrated actual bias or would cause a reasonable person to question his impartiality.

Dorothy Willner has failed to present any facts that would support an inference that Judge Rogers was actually biased against her as the result of his leadership position in the University of Kansas' alumni affairs. The law of this circuit does not require recusal on the basis of mere speculation that such activities would cause him to harbor prejudice against her. *Hinman,* 831 F.2d at 939-40.

A motion to recuse under section 455(a) must be timely filed. *See Singer v. Wadman,* 745 F.2d 606, 608 (10th Cir. 1984) (motion to recuse under both 28 U.S.C.

§§ 144 and 455(a) was untimely) *cert. denied,* 470 U.S. 1028 (1985); *see also Oglala Sioux Tribe v. Homestake Mining Co.,* 722 F.2d 1407, 1414 (8th Cir. 1983) (section 455(a) has a timeliness requirement); *United States v. Slay,* 714 F.2d 1093, 1094 (11th Cir. 1983) (same), *cert. denied,* 464 U.S. 1050 (1984); *Chitimacha Tribe v. Harry L. Laws Co.,* 690 F.2d 1157, 1164 n.3 (5th Cir. 1982) (same), *cert. denied,* 464 U.S. 814 (1983); *In re International Business Machines Corp.,* 618 F.2d 923, 932 (2d Cir. 1980) (same).

In the instant matter, the complaint was filed on December 1, 1982. The first motion to recuse based on Judge Rogers' alumni activities was not filed until October 11, 1983. Discovery would have been completed by this time except for Dorothy Willner's recalcitrance in ignoring the defendants' requests for more complete answers to their interrogatories. Granting a motion to recuse many months after an action has been filed wastes judicial resources and encourages manipulation of the judicial process. *See International Business Machines Corp.,* 618 F.2d at 933 (imposition of a timeliness requirement in considering recusal motions is necessary to prevent waste of judicial resources). The motion to recuse based on Judge Rogers' alumni activities was untimely.

Dorothy Willner's contention that Judge Rogers asked Myra Hinman whether she felt he would be biased because of his participation in alumni activities must also fail because of untimeliness. We note that in *Hinman,* another panel of this court concluded that the allegations in Myra Hinman's recusal requests did not support a motion for recusal under section 144 or section 455. 831 F.2d at 939-40.

Equally untimely is Dorothy Willner's February 7, 1986 motion to recuse Judge Rogers because he was President of the Board of Governors of the University of Kansas Law School. This information was known to Dorothy Willner for at least one year prior to the filing of this motion. She relied upon the same facts in her petition for a writ of mandamus filed in this court on February 11, 1985.

In the February 7, 1986 recusal motion, Dorothy Willner also alleged that the district judge should recuse himself for permitting her attorney to withdraw on "spurious grounds" and for refusing to strike his alleged defamatory remarks from his withdrawal petitions. These adverse orders were rendered approximately three years prior to the recusal motion. These grounds for recusal are clearly untimely.

III.

VALIDITY OF THE ORDER COMPELLING FURTHER DISCOVERY

Dorothy Willner argues that the district court committed reversible error in ordering her to provide more complete answers to the defendants' interrogatories. We disagree.

A district court's ruling on a motion to compel discovery is reviewed for abuse of discretion. *Naugle v. O'Connell*, 833 F.2d 1391, 1397 (10th Cir. 1987).

Willner argues that the district court abused its discretion because it violated the spirit of the 1983 amendment to Fed. R. Civ. P. 26 which encourages judicial

control over excessive use of discovery. She contends that the answers to defendants' interrogatories are contained within her deposition and, thus, compelling her to answer the interrogatories is an excessive use of discovery. Dorothy Willner's deposition contained over 1500 pages. Counsel for the defendants persuaded the district court that it would be unfair to compel their law clerks to search through this voluminous transcript to find the answer to five questions. Furthermore, she was served with the interrogatories and the motion to compel further answers before her deposition was taken in July 1984. Under these circumstances, the district court did not abuse its discretion in ordering her to supplement her answers to five interrogatories.

Dorothy Willner also complains that the district court abused its discretion in denying her September 24, 1986 motion for a ten-day extension to supplement her answers. The district court acted well within its discretion. The defendants moved to compel more complete answers on August 18, 1983. Dorothy Willner was first ordered to supplement her answers on March 5, 1984. She failed to comply with this order. She did not offer any explanation for her defiance of the court's order until the defendants moved to dismiss the action on August 10, 1984. Thus, Dorothy Willner had notice for more than one year prior to September 19, 1984 that the defendants were seeking a further response to their interrogatories. She also defied a court order to supplement her answers without explanation for over six additional months. Under these circumstances, the district court did not abuse its discretion in refusing to permit her to delay further the prosecution of this action.

IV

VALIDITY OF THE SANCTION OF DISMISSAL

The district court dismissed the action against the individual defendants because of Dorothy Willner's failure to comply with the discovery order of the court. As discussed above, on September 19, 1984, when the district court allowed Dorothy Willner up to ten days to comply with the March 5, 1984 order compelling further answers to the interrogatories, she was warned that "[f]ailure to comply with this order will result in the dismissal of the actions against the individual defendants." She failed to comply. On October 15, 1984, the district court dismissed the claims against the individual defendants. The court found that she had over six months to submit supplemental answers as ordered on March 5, 1984 but willfully failed to do so in the face of the court's warning that dismissal would occur if she did not comply within ten days of September 19, 1984.

If a party fails to provide discovery, the court may dismiss the action. Fed. R. Civ. P. 37(b)(2)(C). This court reviews an order of dismissal for failure to provide discovery for abuse of discretion. *Mettsching v. United States*, 704 F.2d 505, 506 (10th Cir.), *cert. denied*, 464 U.S. 829 (1983).

We have reviewed the record. It demonstrates willful disregard of the court's orders. The district court's finding that Dorothy Willner's actions constitute "a willful failure to cooperate in the discovery process" was not clearly erroneous.

Dorothy Willner asserts that the refusal to grant her additional time to answer the interrogatories because of

the Jewish High Holy Days violated her rights under the First Amendment. The district court's September 19, 1984 order did not violate her constitutional rights. She was given up to ten days to comply with the court's order. She was free to budget her time to complete her responsibility to the court in less than the maximum allotted time and before September 26, 1984, the first day of her religious observance.

V

SUFFICIENCY OF THE EVIDENCE

Willner contends that the district court's findings of fact are not supported by the evidence presented at trial.

A district court's findings of facts may be overturned on appeal only if they are clearly erroneous. Fed. R. Civ. P. 52(a); *Anderson v. City of Bessemer City,* 470 U.S. 564, 574 (1985); *Carino v. Univ. of Oklahoma Bd. of Regents,* 750 F.2d 815, 820 (10th Cir. 1984). A finding is clearly erroneous only if " 'the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.' " *Anderson,* 470 U.S. at 573 (quoting *United States v. United States Gypsum Co.,* 333 U.S. 364, 395 (1948)). This court cannot reverse a district court simply because we might have decided the case differently. *Id.* "If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Id.* at 573-74. The Supreme Court has urged deference to the district court's findings whether those findings are based on credibility determinations, documentary evidence, or both. *Id.* at 574-75.

Willner contends that the district court relied heavily on a letter, dated March 5, 1972, to the Dean of the College at the University of Kansas from Robert Squier, Chairman of the Anthropology Department, addressing Willner's early claims of discrimination and retaliation. Willner argues, however, that it was clearly erroneous for the court to rely on the explanations and information in the letter because it provided false and misleading information in the form of a table with salary information for the anthropology department. Willner claims that the table inaccurately represents the percentage increase in salaries among the anthropology professors. In support of her argument, Willner compared the salary information in the table with that provided by the defendants at trial that contained the official budget data of the University of Kansas, including professors' salaries.

Willner's comparison is flawed. The table attached to Squier's letter listed the percentage increases in salary that the anthropology department *recommended* for each of its professors. The information contained in the official budget data was the *actual* percentage salary increases. The anthropology department's function was to recommend a salary increase to the University of Kansas. The University of Kansas administration made the final decisions. Thus, Willner's claim that Squier's letter contained false and misleading information is incorrect.

Willner also argues that there was no merit system at the University of Kansas. The district court's finding that there was a valid merit system is supported by the testimony produced at trial. Documentary evidence was presented, including evaluation forms used by the faculty committee, faculty handouts explaining the merit system,

and minutes from faculty meetings where the system was discussed.

Third, Willner contends that the evidence shows that she was discriminated against because she did not receive equal pay, although she performed comparable work. The district court's findings that she did not receive equal pay because she was not contributing to the department and was not cooperating with the evaluation process were amply supported by testimony and documentary evidence. This proof included letters written by Willner in which she refused to submit necessary information to the anthropology department's salary committee.

The district court found that salary increases in the anthropology department were determined by evaluation on the basis of merit. This finding is amply supported by the testimony of former and present chairpersons. Originally, the department chairperson was responsible for evaluating the faculty and recommending their salary increases to the Dean of the College of Liberal Arts and Sciences, but beginning in 1977, that job was delegated to a committee made up of three members of the department. The faculty selected the members and voted on the procedures by which the committee would arrive at its recommendations. The record shows that, before the change in evaluation procedure, faculty members were judged on the basis of quality of their instruction, their research, and service, not on the basis of rank or seniority.

The district court also made extensive findings as to the scores and the salary increases that Professor Willner received from the chairperson or the committee in various years. These findings were supported by the

testimony at trial, and court exhibits. The court found that Professors White, Johnson and Schott testified that Professor Willner failed to submit the materials needed for proper evaluation, or submitted them late and to the wrong person, and that during several years she received no increase because of her failure to cooperate. This evidence supports the court's determination that Professor Willner's salary increases were dictated by the fair application of the merit evaluation system and were not the result of sex discrimination.

The district court also found that the University of Kansas and its employees did not retaliate against Professor Willner because she filed charges with the EEOC and the district court. The court found that Professor Willner's interpersonal problems in the department were a result of her abusive and arrogant manner. The district court also heard testimony regarding Willner's unwillingness to sit on committees, or to submit her course schedules on time. Other witnesses testified concerning her abusive behavior and threats she made to her colleagues. This testimony revealed and the district court concluded that, if anything, Willner received favorable treatment from the University of Kansas over the years in an effort to placate her.

The thoroughness of the district court's findings and extensive discussion of the evidence demonstrates that the court carefully considered the entire record. Each of the court's findings is supported by evidence in the record. After reviewing the evidence, we are *not* left with a "definite and firm conviction that a mistake has been committed." *Id.* at 573. Accordingly, the judgment is AFFIRMED.

(Filed June 1, 1988)

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Nos. 87-1249,
87-1869

DOROTHY WILLNER,
Plaintiff-Appellant,

v.

GENE BUDIG, F. ALLAN HANSON, ALFRED E. JOHNSON, ROBERT L. LINEBERRY, ROBERT J. SMITH, and DEANELL TACHA,
Defendants-Appellees.

Appeal from the United States District Court
for the District of Kansas
Dale E. Saffels, District Judge, Presiding
(D.C. No. 85-2288-S)

Dorothy Willner, Pro se, Plaintiff-Appellant.

Rose Marino, Associate General Counsel, University of Kansas; J. Steven Pigg, Fisher, Patterson, Sayler & Smith, Topeka, Kansas; Clifford T. Mueller and Douglas M. Greenwald, McAnany, Van Cleave & Phillips, Lenexa, Kansas for Defendants-Appellees.

Before: WRIGHT, ALARCON, and HALL, Circuit Judges.*

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*Honorable Eugene A. Wright, Honorable Arthur L. Alarcon, and Honorable Cynthia Holcomb Hall, Circuit Judges, United States Court of Appeals for the Ninth Circuit, sitting by designation.

Per Curiam.

Dorothy Willner appeals from the grant of summary judgment for the defendants and from the imposition of attorney fees and costs in her civil rights suit. We affirm.

I

Dorothy Willner is a full professor of anthropology at the University of Kansas. The six defendants are individuals associated with the University whom Willner has sued in their individual capacities. Willner claims that while acting as agents of the University and under color of state law, the defendants conspired to commit and did commit various acts of harassment and retaliation against her for bringing a sex discrimination claim against the University. Willner specifically claimed that the following acts constituted harassment or retaliation: omitting materials on her curriculum vitae, providing insufficient salary increases, bringing complaints against her, seeking to have her removed from the anthropology department, manipulating her assignments to reduce student enrollment, depriving her of office services, harassing a student until the student ceased to study with her, affecting her course enrollment, and creating problems with the documents she had submitted in support of raises. She claimed that these acts of harassment and retaliation violated the first, fifth, and fourteenth amendments, the Civil Rights Acts (Title 42 U.S.C. §§ 1983, 1985, 1986), and Title IX (20 U.S.C. § 1681). Willner added pendent state law claims for fraudulent interference with economic relations, slander, and intentional infliction of emotional distress. The district court granted summary judgment on all these claims and awarded the defendants attorney fees and costs.

II

Willner contends that the district court erred when it granted summary judgment on her section 1983 claim against the defendants in their individual capacities.[1] We will affirm a grant of summary judgment if it is clear from the record that there are no genuine issues of material fact and the defendants are entitled to judgment as a matter of law. *Security Insurance Co. of Hartford v. Wilson*, 800 F.2d 232, 233 (10th Cir. 1986).

The district court found that there were no genuine issues of material fact because collateral estoppel barred relitigation of the issues that formed the basis of Willner's section 1983 claim.

Collateral estoppel precludes the relitigation of factual or legal issues that were decided in a previous case, regardless of whether that case was based on the same cause of action. There are two prerequisites to the application of collateral estoppel: (1) the issue to be precluded must have been actually and necessarily decided in the prior case, and (2) the party against whom collateral estoppel is invoked must have had a full and fair opportunity in the earlier case to litigate the issue to be precluded. *Ten Mile Industrial Park v. Western Plains Service Corp.*, 810 F.2d 1518, 1523 (10th Cir. 1987).

The factual basis for Willner's section 1983 claim is that the defendants, acting as agents of the University in their individual capacities, harassed or retaliated against

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1. Willner also contends that the district court erred by dismissing her claims against the defendants in their *official* capacities because she never sued them in their official capacities. Any error that resulted from dismissing nonexistent claims is harmless.

Willner for bringing her sex discrimination claim against the University.

In an earlier action, Willner brought an employment discrimination suit against the University. Willner claimed that the University and its agents, by committing acts virtually identical to those alleged in this case, harassed her and retaliated against her for bringing a sex discrimination claim, in violation of Title VII, 42 U.S.C. § 2000e, and the Equal Pay Act, 29 U.S.C. § 206(d). The court entered judgment for the defendants, finding that neither the University nor its agents, employees, or officials retaliated against her or harassed her because she filed a sex discrimination claim. The court noted that Willner simply misperceived many acts of the University as retaliation or reprisal.

Willner's claims in this case that University agents harassed and retaliated against her because she brought a discrimination suit were actually and necessarily decided in her earlier suit.[2]

In her Title VII action, Willner was allowed to present extensive evidence about the alleged retaliatory actions of individuals at the University. Furthermore, Willner answered virtually all the interrogatories in this case by

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2. Defendants argue that since Willner lost her Title VII action against the University, res judicata bars any further suits arising from the same set of facts. However, the defendants were named in their *individual* capacities. Government employees in their *individual* capacities are not in privity with their government employer. *See Morgan v. City of Rawlins*, 792 F.2d 975, 980 (10th Cir. 1986); 18 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 4458 & n.12 (1981 & Supp. 1987); 1B J. Moore, Moore's Federal Practice ¶ 0.411 n.41 (2d ed. 1984 & Supp. 1987-88) (collecting cases). Res judicata does not bar Willner's claims against the defendants in their *individual* capacities because the defendants are not in privity with the University.

refering to evidence in her Title VII action. She was given a full and fair opportunity to prove these allegations of retaliation and harassment which now form the basis for her section 1983 suit. Reframing her legal theory about why the retaliation and harassment were illegal does not alter the fact that in a different suit a court determined that the University and its agents did not harass or retaliate against her.

We hold that the district court did not err in granting summary judgment on Willner's section 1983 claim because collateral estoppel barred relitigation of the issues that formed the basis for her claim.[3]

Willner also contends that the district court erred in granting summary judgment on her section 1985 and section 1986 claims and on her pendent state law claims of intentional infliction of emotional distress, slander, and fraudulent interference with economic relations.

We hold that the court properly granted summary judgment on these claims. The defendants met their initial responsibility by demonstrating the absence of sufficient evidence necessary to establish all the essential elements of each of Willner's claims. Willner failed to

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3. Willner contends that her inability to pursue her civil rights and constitutional claims against these six individual defendants during her Title VII trial means that she did not have a full and fair opportunity to litigate those claims. Willner's argument misses the point. While she was prevented from mentioning that she had other causes of action for these alleged acts of retaliation or that she could sue other parties, Willner was given a full opportunity to prove that University agents retaliated against her.

Willner's argument that collateral estoppel does not bar her section 1983 claim for deprivation of property and liberty without procedural due process is not before us because she did not plead this claim in her amended complaint. Furthermore, there are insufficient facts in the record to support this claim.

meet her burden to go beyond her pleadings and designate specific facts showing that there were genuine issues for trial on every element of each of these claims. *See Celotex Corp. v. Catrett*, 106 S. Ct. 2548, 2552-53 (1986).

III

Willner contends that the district court erred in awarding attorney fees to the defendants because the court failed to apply the guidelines set down in *Dickerson v. City Bank & Trust*, 590 F. Supp. 714, 720 (D. Kansas 1984), which would prevent the award of fees in this case. She does not challenge the exercise of the court's discretion under 42 U.S.C. § 1988 (1982).

In *Dickerson*, Chief Judge Earl E. O'Connor of the District Court of Kansas set forth guidelines to be followed in his court when parties apply to him for attorney fees pursuant to 42 U.S.C. § 1988 (1982). 590 F. Supp. at 720. The district court in this case determined that *Dickerson* "does not mandate a denial of fees." We agree. The guidelines Chief Judge O'Connor set down for his courtroom are not binding on other district judges. *See Starbuck v. City and County of San Francisco*, 556 F.2d 450, 457 n.13 (9th Cir. 1977) ("The doctrine of *stare decisis* does not compel one district court judge to follow the decision of another."). The district court did not err by failing to follow *Dickerson*.

IV

Willner contends that the district court erred when it failed to rule on her motion for a default judgment against defendant Budig because his name did not appear in the original answer filed by the defendants. How-

ever, the district court effectively denied her motion when it allowed the defendants to file an amended answer that corrected the omission in the first answer. The court did not abuse its discretion in allowing the defendants to file an amended answer to correct the mistaken omission in the initial answer.

V

Willner alleges that Judge Saffels abused his discretion by failing to recuse himself pursuant to 28 U.S.C. § 455. She alleges that the judge was biased against her because he repeatedly ruled against her and allegedly made legal errors. Willner's allegation that Judge Saffels was biased against her is unsupported by any facts. "[A] motion to recuse cannot be based solely on adverse rulings." *Willner v. University of Kansas,* No. 86-2678, slip op. at 8 (10th Cir. May —, 1988) (per curiam).

VI

Willner contends that the district court erred by taxing her for the defendants' cost of taking her deposition. We review the imposition of costs for an abuse of discretion. *Furr v. AT&T Technologies,* 824 F.2d 1537, 1550 (10th Cir. 1987). Defendants used Willner's deposition in support of their summary judgment motion. The district court did not abuse its discretion because taking the deposition was reasonably necessary to the litigation of the case. *See id.*

VII

Willner contends that the district court erred in ordering her to responsively answer interrogatories and in ordering her to pay the costs incurred in seeking this

further response under Fed. R. Civ. P. 37(a)(4). Discovery rulings are within the broad discretion of the trial court. *Shaklee Corp. v. Gunnell*, 748 F.2d 548, 550 (10th Cir. 1984). These orders were within the court's discretion.

VIII

Willner's claim that the district court erred in failing to sanction the defendants for using the term "mental infirmities" is meritless.

IX

Defendants request that we award their costs, expenses, and attorney fees under Fed. R. App. P. 38. We may award these costs when an appeal is frivolous. *Braley v. Campbell*, 832 F.2d 1504, 1510-11 (10th Cir. 1987). An appeal is frivolous if the result is obvious or if the appellant's arguments wholly lack merit. *Id.* We cannot say that Willner's appeal is totally without merit; therefore, defendants' request is denied.

AFFIRMED.

(Filed October 15, 1984)

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Case No. 82-4291

DOROTHY WILLNER,
Plaintiff,

vs.

UNIVERSITY OF KANSAS, et al.,
Defendants.

ORDER

This matter is presently before the court upon plaintiff's motion for reconsideration and plaintiff's motion for an extension of time to supplement interrogatories. Having carefully reviewed the materials before the court, we are now prepared to rule.

Plaintiff seeks to have the court reconsider its opinion of August 29, 1984, in this case. Plaintiff argues that her claim under 42 U.S.C. § 1981 should be reinstated by the court. The court finds nothing in plaintiff's motion requiring modification of our order of August 29. Accordingly, plaintiff's motion shall be denied.

We next move to plaintiff's motion for an extension of time to supplement interrogatories. On September 19, 1984, the court directed the plaintiff to supplement certain interrogatories submitted by the individual defendants within ten days of the date of the order. This order was

issued upon the motion to dismiss filed by the individual defendants. The individual defendants had sought to have the action dismissed against them for the plaintiff's failure to supplement the aforementioned interrogatories as directed by Magistrate Van Bebber in his order of March 5, 1984. In our order of September 19, 1984, we stated:

> [T]he court shall provide the plaintiff with but ten days to comply with Judge Van Bebber's order of March 5, 1984. Plaintiff shall submit supplemental answers to interrogatories nos. 3, 5, 9, 10 and 11. These answers should be detailed and complete and simply attaching xeroxed pages from the deposition will not suffice. Failure to comply with this order will result in the dismissal of this action against the individual defendants.

On September 24, 1984, plaintiff filed the instant motion for extension of time. In this motion, plaintiff requests an additional ten days to supplement these interrogatories because of the occurrence of certain Jewish holidays during the last week of September. On October 3, 1984, plaintiff filed a pleading with the court entitled "Certificate of Compliance with Court Order." In this pleading, plaintiff asserts that she has made every effort to comply with the court's order of September 19, 1984. She further states that she has completed the answers to interrogatories nos. 3 and 5 and served them on the defendants. Finally, she alleges that she will continue to complete the answers to other interrogatories "as soon as possible."

Based upon the recent developments in this case, the court finds it necessary to dismiss plaintiff's claims against the individual defendants for plaintiff's failure to comply

with the court's order of September 19, 1984. The court does not find that plaintiff has shown good cause for the extension of the deadline established in our order of September 19, 1984. However, even if the court were disposed to grant plaintiff's motion for an extension of time, it is apparent that she has not filed the supplemental answers to the interrogatories within twenty days of the court's order. The court file does not indicate that she has served answers to any of the other interrogatories and she has made no further requests for extensions of time. Plaintiff has only noted that she will complete the answers "as soon as possible." In our order of September 19, the court tried to impress upon plaintiff the need to strictly comply with the orders of the court. However, plaintiff apparently feels no compunction to do so by noting that she will comply "as soon as possible." As we stated in our previous order, dismissal is an undeniably harsh sanction. Nonetheless, it is necessary at times to prevent abuses of our judicial system. *See Brown v. McCormick*, 608 F.2d 410 (10th Cir. 1979); *Sperandeo v. Milk Drivers & Dairy Employees Local Union No. 537*, 334 F.2d 381 (10th Cir. 1964). Here, plaintiff has had over seven months to submit the supplemental answers and she has failed to complete them. Plaintiff had full warning of the court's intention if she failed to comply with our order of September 19. Plaintiff's actions can only be characterized as a willful failure to cooperate in the discovery process. Therefore, we shall dismiss plaintiff's claims against the individual defendants pursuant to Fed.R.Civ.P. 37(b) for her failure to comply with the orders of this court.

IT IS THEREFORE ORDERED that plaintiff's motion for reconsideration be hereby denied.

IT IS FURTHER ORDERED that plaintiff's motion for an extension of time to supplement interrogatories be hereby denied.

IT IS FURTHER ORDERED that plaintiff's claims against the individual defendants be hereby dismissed pursuant to Fed.R.Civ.P. 37(b) for plaintiff's failure to comply with the orders of this court.

IT IS SO ORDERED.

Dated this 15th day of October, 1984, at Topeka, Kansas.

/s/ Richard D. Rogers
United States District Judge

(Filed December 6, 1984)

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Case No. 82-4291

DOROTHY WILLNER,
Plaintiff,

vs.

UNIVERSITY OF KANSAS, et al.,
Defendants.

ORDER

This matter is presently before the court upon plaintiff's motion for reconsideration of this court's order of October 15, 1984 (Doc. # 157) and plaintiff's alternative motion for certification of the order of October 15, 1984 to allow immediate appeal (Doc. # 171). Having carefully reviewed the file, the court is now prepared to rule.

In our order of October 15, 1984, the court dismissed the plaintiff's claims against the individual defendant in this action pursuant to Fed.R.Civ.P. 37(b) for plaintiff's failure to comply with the orders of this court. Plaintiff now contends that the court should reconsider because the order contained a factual error. Further, plaintiff asserts that the court abused its discretion in denying plaintiff's request for an extension of time to comply with the court's order.

The court shall briefly set forth the procedural background of plaintiff's motion. The individual defendants submitted interrogatories to the plaintiff in February, 1983. On July 1, 1983, plaintiff served answers to the interrogatories upon the defendants. Thereafter, an order of the court stayed discovery in the case until September 23, 1983. On August 18, 1983, the defendants filed a motion to compel discovery with regard to the answers to the interrogatories made by the plaintiff. On March 5, 1984, the court directed plaintiff to supplement her answers to the interrogatories by March 30, 1984. On August 10, 1984, defendants filed a motion to dismiss pursuant to Rule 37(b) for plaintiff's failure to supplement the interrogatories. A hearing was held on September 18 and on September 19, the court declined to grant the motion but directed the plaintiff to supplement the interrogatories within ten days. In that order, the court stated: "Failure to comply with this order will result in the dismissal of this action against the individual defendants." Thereafter, on September 24, 1984, plaintiff filed a motion for a ten-day extension of time to comply with the court's order. On October 15, 1984, the court denied plaintiff's motion for an extension of time and dismissed the plaintiff's claims against the individual defendants.

The court shall now address the arguments made by the plaintiff in her motion for reconsideration. The court now recognizes that, due to a delay in the filing of certain documents in the court file, the order of October 15 does contain a factual error. This mistake, however, has no impact upon the order. The court's decision was not based upon this finding. It was only inserted

as an additional statement regarding the status of the case. Thus, we find that this argument does not merit reversal of the court's order of October 15, 1984.

Next, plaintiff contends that the court abused its discretion in denying her an additional ten days to comply with the order of October 15. Plaintiff asserts that because of certain religious holidays she could not comply with the court's order. The court finds no abuse of discretion in our order of October 15. Plaintiff has had a considerable amount of time to supplement the interrogatories and she has failed to do so. Plaintiff sets forth a number of reasons why she was unable to supplement the interrogatories propounded by the individual defendants for over seven months. The excuses offered by the plaintiff do not persuade the court that its order of October 15 was in error. Plaintiff seems to believe that because she ran into certain problems with her case that all deadlines established by the court were stayed. This is not so. Plaintiff remained under an obligation during this period to comply with the orders of the court. Quite frankly, the court felt that dismissal was appropriate when we considered the defendants' motion to dismiss on September 18. However, the court decided that plaintiff should be given another chance and thus we allowed her ten days to complete the answers to the interrogatories. The court purposely provided plaintiff with a short period of time to prompt her to quick action. Further, the court specifically warned the plaintiff of the action that would be taken by the court if the interrogatories were not supplemented during this ten-day period. Plaintiff failed to comply with the court's order and we did not find that the plaintiff had

shown good cause for an extension of time. The court continues to adhere that finding and thus we shall deny plaintiff's motion for reconsideration.

The court shall now consider plaintiff's alternative motion for certification of our order of October 15 to allow immediate appeal. The court finds the reasons stated by the plaintiff to certify the court's order of October 15 for immediate appeal to be insufficient. *See D & H Marketers, Inc. v. Freedom Oil & Gas, Inc.*, ... F.2d ..... (10th Cir. October 3, 1984). Accordingly, plaintiff's motion shall be denied.

IT IS THEREFORE ORDERED that plaintiff's motion for reconsideration (Doc. # 157) be hereby denied.

IT IS FURTHER ORDERED that plaintiff's alternative motion for certification to allow immediate appeal (Doc. # 171) be hereby denied.

IT IS SO ORDERED.

Dated at Topeka, Kansas, this 3rd day of December, 1984.

/s/ Richard D. Rogers
United States District Judge

(Filed September 16, 1986)

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Case No. 82-4291

DOROTHY WILLNER,
Plaintiff,

vs.

UNIVERSITY OF KANSAS,
Defendant.

MEMORANDUM AND ORDER

INTRODUCTION

This is an employment discrimination action brought by the plaintiff, Dorothy Willner, against the defendant, the University of Kansas. Plaintiff, a professor of anthropology, alleges that the defendant discriminated against her because of her sex in salary determinations and retaliated against her because she filed complaints within and outside the University alleging sex discrimination. Plaintiff brings this action pursuant to Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §2000e *et seq.*, and the Equal Pay Act (EPA), 29 U.S.C. §206(d). The trial of this action has concluded and the court is now prepared to issue findings of fact and conclusions of law.

Before we set forth our findings, the court finds it necessary to make several comments and observations.

This action was originally filed by plaintiff through an attorney. Plaintiff's original counsel eventually sought to withdraw, as did several other attorneys. After the court provided the plaintiff with significant time to find other counsel, plaintiff elected to proceed *pro se*. Plaintiff conducted the trial of this action *pro se*. The court certainly did not expect the trial to proceed as smoothly as a trial with two attorneys representing the parties. Given the plaintiff's inexperience with the rules of evidence and with courtroom protocol, a certain amount of confusion, delay, even irregularity, would be expected. The court, however, was not prepared for the obstreperous and disrespectful conduct engaged in by the plaintiff during the trial. The plaintiff's conduct during the trial was the worst experienced by the court in eleven years on the bench. During those eleven years, the court has tried a number of cases with litigants proceeding *pro se*. These cases have included criminal cases where convicted murderers have represented themselves and civil cases where poorly educated individuals have represented themselves. In every case, these litigants conducted themselves in a dignified and respectful manner. The plaintiff here was rude and abusive to the court and to witnesses, was disruptive during the court proceedings, and was repeatedly late for court despite stern warnings from the court. Plaintiff's repeated unruly and disrespectful conduct would surely have drawn a contempt citation if she were an attorney.

With those comments behind us, the court shall issue its findings of fact and conclusions of law. The court has not attempted to find every fact presented to the court during the trial because of the incredible number of incidents testified to by the parties. The court heard

considerable evidence on each of these incidents, and we believe that little would be served by setting out facts that would occupy hundreds of pages.

FINDINGS OF FACT

1. Plaintiff joined the faculty at the University of Kansas ("KU" or "the University") in 1965 as an associate professor in the Department of Anthropology. Plaintiff's starting salary was $10,000 for a nine month appointment. She has been employed by KU since that time.

2. KU is a state educational institution operated and managed under the supervision of the Kansas Board of Regents. The monies available for faculty salaries depend on the annual amount appropriated by the Kansas legislature.

3. The Department of Anthropology (Department) is a part of the College of Liberal Arts and Sciences within the University. Over the past fifteen years, the size of the Department has ranged from twelve to fifteen professors. The Department is administered by a chairperson. The chairperson is appointed by the Dean of the College of Liberal Arts and Sciences. Robert Squier served as chairperson of the Department from 1964 to 1968 and as acting chairperson from 1971 to 1972, 1976 to 1977, and in 1982. M. Dale Kincade served as chairperson from 1969 to 1971. Henry Lundsgaarde was chairperson from 1972 to 1976. Anta Montet-White served as chairperson from 1977 to 1981. Alfred Johnson began serving as chairperson of the Department in January, 1983.

4. In 1969, plaintiff was recommended by her colleagues in the Department for promotion to the rank of full professor. Plaintiff was denied a promotion at that

time. Chairperson Kincade responded with a strenuous objection to this decision by the University's promotion committee. In 1970, plaintiff was again recommended for promotion by her fellow faculty members. This time plaintiff received the promotion.

5. The issue of salary increases for the members of the Department has been a source of discussion and dissension among the faculty for many years. Since plaintiff has been employed at KU, the Department has used a merit system for evaluation of faculty salary increases. Both males and females in the Department have registered complaints about the merit salary system at one time or another. The system has been changed and refined over the years. Each of these changes has occurred as the result of a majority vote by the members of the faculty in the Department. Until 1977, salaries within the Department were set by the chairperson. Each faculty member was evaluated based on the following criteria: teaching, research and service. These criteria were the same used by the University for tenure and promotion decisions. Faculty members were well-acquainted with these criteria and the procedures used in operating the system when the chairperson set the salaries. In 1977, the Department adopted a committee system to advise the chairperson in salary matters. This system with its procedures and criteria was codified in written form and compiled in a Departmental Policies and Procedures Handbook, which was distributed to all faculty members. The committee system provides for the election of three faculty members, one from each of the three subdisciplines of the Department. The task of the committee is to evaluate their colleagues in the Department based on the teaching, research and service criteria. Each faculty member is re-

quired to submit information to the merit salary evaluation committee for evaluation purposes. The committee then establishes a rating for each faculty member in each of the designated categories. This rating is transmitted to the chairperson who may modify the rating. The committee's evaluation and the chairperson's view of the evaluation are then given to each faculty member, and an opportunity is provided to each faculty member to meet with the committee if the faculty member does not agree with the evaluation. The final rating is translated into a dollar amount by the chairperson and transmitted to the Dean of the College of Liberal Arts and Sciences. The Dean reviews the figures provided by the chairperson. He has the power to make changes before he transmits them to the Vice Chancellor for Academic Affairs. The Dean is also responsible for recommending the salary increase of the chairperson of the Department. The process continues with the salary recommendations ultimately going to the Chancellor of the University, the chief executive officer of the University, and then on to the Board of Regents.

6. The Department has established explicit guidelines and standards for the evaluation of the categories of teaching, research and service, although the Department frankly recognizes that it is difficult to quantify a faculty member's performance in any of these categories. In arriving at a rating for the teaching category, the committee examines student evaluations, quality of teaching, teaching awards, teaching load, advising and peer review. Faculty members may submit student evaluations to the salary evaluation committee once a year. The research aspect of the evaluation system is based on the quality and quantity of a faculty member's re-

search activity. Published books, articles, reviews, works in progress and research grants received are all considered in the evaluation of the research category. The service category is based on each faculty member's activity on departmental and university committees as well as participation in professional organizations. A faculty member's rank as professor, associate professor or assistant professor is not a critical factor in the merit evaluation process. Seniority of a faculty member is also not a factor in the merit evaluation process.

7. Plaintiff began raising complaints about her salary as early as 1972. In January, 1972, plaintiff telephoned Chairperson Squier to inform him of her salary expectations for fiscal year 1973. Squier informed her that it was unlikely her demands could be met due to the amount of monies that was available. He recommended that she present her demands to the Dean of the College of Liberal Arts and Sciences by February 2, 1972, the deadline for each chairperson to submit his priorities to the Dean for the next fiscal year. Plaintiff ultimately responded with a letter to Chairperson Squier on February 21, 1972. In this letter, plaintiff contended for the first time that she had been discriminated against because of her sex in salary matters and promotion matters. She also complained that some members of the Department faculty were discouraging students from taking her courses. She asserted that she had been subjected to a "campaign of deliberate harassment" for the past two years. She concluded the letter as follows:

> I should like to say, in conclusion, that I recognize and appreciate your warm support of women in the Anthropology Department. Apart from the matter of salary, which has been a university-wide

> and nation-wide phenomenon, I have felt insulated from the anti-feminism of some other colleagues in the department when you have been chairman.

Plaintiff sent copies of the letter to the Dean of the College of Liberal Arts and Sciences, the Vice Chancellor and the Chancellor of the University.

8. Chairperson Squier was angered by plaintiff's letter for several reasons. First, he was disturbed by plaintiff's decision to distribute copies of the letter to members of the administration. Second, he was upset that plaintiff had raised the issue of sex discrimination for the first time in a letter sent to the administration without providing him an opportunity to address the matter. Finally, he felt that plaintiff's charges were completely unfounded. In a letter to the Dean on March 15, 1972, Squier spoke to these matters. With regard to plaintiff's decision to take the salary issue to the administration, Squier wrote:

> First, a few words on the genesis of Professor Willner's letter. You will remember that in the Chairmen's meeting of January 26 you suggested that we submit to you by Wednesday, February 2, our departmental priorities for salary increases based upon a five percent figure for the University. On Friday, January 28, Professor Willner telephoned me to present her expectations as to her salary for the 1972-73 year. I informed her that I was about to submit to you our departmental priorities for increases, in which she would necessarily figure, but that the salary increase she stated could not be entertained if we were to receive only a five percent increment overall. I suggested that if she wished

to present her demands in written form to you along with our departmental statement of priorities on February 2, she should feel free to do so. No suggestion was made that she should send copies to other administration officials, nor did I provide her with any salary figures for persons in this department other than herself. She did not meet the February 2 date; her February 21 letter was the eventual outcome of our conversation.

He then exhaustively set forth the reasons why he believed that plaintiff's complaints of sex discrimination were completely lacking in merit. These well-reasoned comments are important in demonstrating plaintiff's proclivity to assert discrimination without full knowledge or assessment of the facts. Chairperson Squier stated in pertinent part:

> Now to Professor Willner's charges of discrimination on the basis of sex in the handling of salaries and promotions in this department. With reference to salaries, Professor Willner is not explicit as to whom her charge of discrimination is directed, but the overall thrust of her letter appears to be directed against this department and I am assuming that this applies in the matter of salary increases. In her telephone conversation with me, she several times made reference to what she interprets as a lack of departmental support in the betterment of her salary position.
>
> I am attaching a table which shows the salary increase percentages which have been recommended by the department for all members of this faculty for the years 1967-68 through 1971-72 (excluding the

chairman, for whom we make no recommendations). A brief glance at the table will show that the charge of sex discrimination in the case of Professor Willner simply cannot be sustained. The following summary, taken from the table attached, compares Professor Willner to other members of the faculty, showing numbers of faculty whom Professor Willner was recommended to receive more than, less than, or the same as, for the years noted (again excluding the chairman):

	1967-68	1968-69	1969-70	1970-71	1971-72
More than	4	7	4	14	11
Less than	6	6	7	0	1
Same as	0	0	2	0	0

It can be seen that Professor Willner ranked, in the matter of salary percentage increases recommended, at about the middle of the faculty for the years 1967-68 through 1969-70, but in 1970-71 and 1971-72 at, or second only to, the top position; hardly "a pattern of discrimination on the basis of sex."

Referring again to the table attached, it is clear that Professor Willner has fared in this department's support (if the chairman's recommendations for salary increases can be said to reflect this) rather better than have her female departmental colleagues who, in turn, have fared better than have some of the male members. Indeed, the claim might facetiously be made that it may be possible to discern a "pattern" of discrimination against certain of the male members.

But this is nonsense. What *does* emerge from these figures is a picture of what has actually been occurring: of the chairman attempting, always with limited resources, imperfect knowledge and his own human limitations, to adjust the salaries of his faculty upwards in keeping with their achievements and their contributions to the department and the discipline, the University and the greater society. And damn the sex of his faculty.

Professor Willner's charge of sex discrimination in the 1968-69 departmental recommendation for her promotion cannot be supported, however she chooses to compare herself with male members of this department. I view her charge as an insult to my predecessor as chairman. Professor Kinkade, who prepared the major part of the departmental recommendation, has consistently been one of Professor Willner's strongest champions as only a hurried study of her file in this office or that in the College Office will clearly show. Whatever "tepid tone" she may have detected in the promotion recommendation would have been due to Professor Kinkade's honest evaluation of Professor Willner, and perhaps also in some degree to his diffidence in writing about one of his colleagues, but it would have had absolutely no connection with sex discrimination on Professor Kinkade's part. Professor Willner might well reflect on the fact that the only two other female regular members of this department were both granted promotions the first time their names were advanced, and while both were still on a half-time basis in this department.

I certainly am not claiming that Professor Willner's salary is at the level it properly should be, any

more than I could claim this for any other member of this department. Nor can I say that the merit increases we are about to propose for the 1972-73 year will very significantly change the salary situation in this department, for Professor Willner or any other member. But I am ready to argue that, given the very small amount which will be available for merit increases for the next year, the figure to be proposed for Professor Willner will reflect, as near as I am able to fathom this, the relative position of Professor Willner vis-a-vis her departmental colleagues.

In our attempts to improve the salary positions of the faculty, it occurs more often than not that the amounts granted leave individual members well below what they believe they are worth to the University. But to construe this as evidence of discrimination on the basis of sex in this department is a gross distortion of the truth, and quite possibly a cynical misuse of the very sensitive issue of sex discrimination in this university.

9. Plaintiff joined with other women in 1972 in protesting against perceived discriminatory practices and policies by the University toward females and minorities. Plaintiff joined a petition filed with the Kansas Commission on Civil Rights (KCCR) which complained of this discriminatory conduct. In 1976, the KCCR and KU reached an agreement on this petition.

10. Professor Lundsgaarde joined the faculty at KU in 1972 and was appointed chairperson of the Department. In 1973, Chairperson Lundsgaarde wrote letters to the Dean of the College of Liberal Arts and Sciences on behalf of plaintiff and another female professor in the

Department, Anta Montet-White, recommending they be given a special increase in their salaries to make up for past inequities.

11. During the fiscal years 1974 and 1975, plaintiff received substantial salary increases. In fiscal year 1974, plaintiff received the largest salary increase in the Department. The increase was over $200 larger than the next highest increase. In fiscal year 1975, plaintiff received the third highest salary increase in the Department.

12. Major changes in the merit salary evaluation system began to take place in 1975. There was growing dissatisfaction among the faculty members with the salary system in that year. Many of the members of the Department were dissatisfied with the salaries set by Chairperson Lundsgaarde. Lundsgaarde initially sought to resign because of the criticism on salary matters but was dissuaded by the Dean of the College of Liberal Arts and Sciences. He eventually appointed an ad hoc committee of faculty members to examine the salary system and make recommendations for the future. In December, 1975, the ad hoc committee made a number of recommendations for improvements to the merit salary system. These recommendations later led to the adoption of the committee system of evaluation.

13. The faculty ultimately voted to adopt the ad hoc committee's recommendation for the establishment of a point system. For fiscal year 1977, Chairperson Lundsgaarde conducted personal interviews with each faculty member and then applied the point system established by the ad hoc committee. Based upon the application of this system, plaintiff received 66 points out of a possible 100

points from Chairperson Lundsgaarde. This translated to a merit salary increase of $1288 for fiscal year 1977. This increase tied for the lowest in the Department. Professor Squier also received an increase of $1288. Plaintiff's yearly salary became $21,488. In his transmission to the Dean of the College of Liberal Arts and Sciences on March 24, 1976, Chairperson Lundsgaarde made the following notation with regard to plaintiff's salary:

> Professor Willner, since her promotion to full professorial rank in 1970, has only published two brief articles. She has annually received larger percentage increases than Professor Lundsgaarde. She has not served in any major administrative activity, generated extramural research grants, or provided evidence of a larger "market value" as demonstrable by invitations and offers from other universities.

14. During the academic year 1976-1977, members of the Department engaged in further discussions on the merit salary system. The faculty spent considerable time attempting to establish definitive and fair standards. In a faculty meeting on February 22, 1977, members of the Department voted eight to one to adopt the use of a committee to establish salaries under a merit system. Plaintiff was the lone dissenter. The guidelines and procedures adopted by the members of the Department were virtually identical to those recommended by the ad hoc committee in December, 1975.

15. In March, 1977, the merit salary committee gave plaintiff the following scores: teaching—13, research—16, service—11. With the addition of 20 points for cost of living, plaintiff's total was 60 points. Although up to 20 points could be allocated to rectify past inequities, the com-

mittee did not provide any points for inequities. The committee made the following statement with regard to inequities:

> The Committee feels that at this time, considering the salary range of full professors in this department, Dr. Willner does not qualify for inequity compensation.

16. This point total translated to a merit salary increase of $810. This salary increase tied for the second lowest in the Department. One of plaintiff's male colleagues received the same increase as she did. The lowest salary increase went to Professor Lundsgaarde, who failed to submit any evaluation materials to the committee. Plaintiff's salary for the 1977-1978 year was $22,298.

17. On January 25, 1978, members of the Department again discussed the merit salary evaluation system. R. J. Smith and C. S. Smith, two male professors, stated that they felt the committee had abused its power last year. Professors Squier and Lundsgaarde opposed the continued use of the committee system. A motion was made to dispense with the committee system which failed.

18. Plaintiff failed to submit any materials to the merit salary evaluation committee in the spring of 1978. The committee was forced to rely on available information to evaluate her. Plaintiff was awarded the following points: teaching—14, research—16, and service—14. This point total translated into a merit salary raise of $1202. This was the lowest salary increase in the Department this year. Plaintiff's salary became $23,500 for fiscal year 1979.

19. On December 12, 1978, the members of the Department voted to change the merit salary evaluation procedures. The faculty voted to recommend only a cost of living increase to those professors who did not submit

materials on their teaching, research and service activities for the previous year. This amendment carried by a seven to one vote.

20. On January 5, 1979, plaintiff wrote to chairperson White and asked that she formally propose a motion to abolish the merit salary evaluation system in the Department at the next faculty meeting. Chairperson White presented the motion at the next faculty meeting and it was soundly defeated.

21. In February, 1979, plaintiff received a salary raise of $640 for 1979-1980. This was again the lowest increase in the Department. Plaintiff again did not submit any materials to the merit salary evaluation committee as required by departmental rules. Plaintiff received $400 as a cost of living raise and $240 as an equity raise. Plaintiff's salary for fiscal year 1980 was $24,140.

22. On February 27, 1979, Chairperson White wrote to the Associate Dean of the College of Liberal Arts and Sciences to explain her views on the salaries set for fiscal year 1980. Professor White specifically addressed the plaintiff's salary. She wrote:

> In answer to your inquiry concerning Professor Willner, I would like to point out:
>
> 1. Professors Johnson and Crawford carry considerable administrative responsibilities as Director of the Museum and Director of the Biological Anthropology Laboratory, respectively. As I have said earlier, our graduate program relies almost entirely on the efforts of these two people.
>
> My own salary (female Professor White) is not very high when compared to that of other chairmen.

2. If seniority is to be considered, there are two other cases in the department I would like to bring to your attention:

   Carlyle Smith was promoted in 1960 to the rank of Full Professor, earlier than anyone else in the department, yet three individuals have higher salaries. I have recommended $500 in addition to the merit raise assigned by the department.

   Robert J. Squier was promoted in 1968 and has served many years as chairman and his salary for 1979 was lower than that of four other faculty members promoted in 1968 or later. I have added $250.00 to Prof. Squier's salary.

3. For the last two years, Professor Willner has declined to submit materials for departmental evaluation. She was the only one to do so this year. (Professor Squier sent in his material late because of illness.) Professor Willner has been kept informed of the department and committee's decisions. I have, in some cases, sent her information by registered mail. She knew in advance that the committee, following a vote of the faculty, would assign 20 points for those who did not submit any material. In contrast, Professors Janzen and Hanson have provided the Committee and myself with considerable information, and it was not difficult to evaluate the quality of their scholarly production.

According to procedures set by the department, Professor Willner received from the Committee 20 points which corresponds to a salary raise of $400.00. I endorse the Committee's decision. I will, however,

at the recommendation of the Office of Academic Affairs, consider adding an equity allocation of $540. This figure to be adjusted if departmental allocations are reduced.

I feel that at this time the relative scale within the department reflects fairly accurately the professional standing and the contribution to the department of our various faculty members.

I still think that, as a whole, the department is about one year behind comparable departments in terms of salaries, but I realize that the situation will not be easily corrected.

23. On December 18, 1979, plaintiff again wrote to Chairperson White and asked that a motion be made to abolish the merit salary evaluation procedures. Such a motion was made at the next Department faculty meeting on January 16, 1980. The motion was defeated with ten voting against it, one in favor, and two abstentions. Several members of the Department suggested amendments, but the procedures were left untouched.

24. In February, 1980, plaintiff submitted her merit salary materials to Chairperson White who submitted them to the committee. Plaintiff received 50 points from the merit salary evaluation committee. She received 20 points for cost of living, 12 points for teaching, 12 points for research and 6 points for service. Plaintiff received a salary increase of $1610 for a total salary of $25,750. Plaintiff's salary increase was the second lowest in the Department. Professor Lundsgaarde received a lower salary increase.

25. In February, 1981, the faculty members of the Department voted to make some significant changes in

the procedures of the merit salary evaluation system. The amendments allowed each faculty member to give more emphasis to one category of evaluation over the others. Each faculty member was allowed to assign a "weight" to be given to each of the categories of teaching, research and service. The faculty member could assign a value of no less than 20% and no more than 70% to the categories of teaching and research. A faculty member could assign a value of no less than 10% and no more than 30% to the category of service. The total of the three categories had to total 100%. The Department provided that the following percentages would be given to those faculty members who did not submit the percentages: teaching—40%; research—40%; and service—20%. The percentages decided upon by each faculty member are not revealed to the merit salary evaluation committee. The Department further decided to award points only in the areas of teaching, research and service. A faculty member could obtain up to ten points in each category. Finally, the faculty amended the rules to provide that a faculty member would receive no salary increase if he failed to provide the committee with the materials setting forth his activities for the previous year.

26. Plaintiff again submitted her merit salary materials to Chairperson White in the spring of 1981. Again, White turned them over to the merit salary evaluation committee. On February 24, 1981, the committee gave plaintiff five points for teaching, seven points for research and three points for service. Plaintiff had suggested that the categories be weighted as follows: teaching—30%, research—60%, and service—10%. Based upon the point totals and the weightings, plaintiff's salary was increased by $1505. This increase was the third lowest in the De-

partment. Two male professors received lower salary increases. Plaintiff's new salary was $27,255.

27. In April, 1981, plaintiff was notified of her salary for fiscal year 1982 by Chairperson White. Plaintiff then filed charges of discrimination based on sex and retaliation with the Equal Employment Opportunity Commission.

28. In February, 1982, plaintiff sent her merit salary information to the Dean of the College of Liberal Arts and Sciences rather than to the departmental committee. The committee eventually received the information and gave plaintiff five points for teaching, four points for research and two points for service. These point totals translated into a $1364 salary increase for the plaintiff. However, the Vice Chancellor of Academic Affairs added $778 to this amount as a salary adjustment. Plaintiff's salary increase was approximately the median for the Department. Plaintiff's salary for fiscal year 1983 became $29,397.

29. Members of the Department were upset that the plaintiff had been given an additional salary increase by the Office of Academic Affairs. One member of the Department noted that "singling [plaintiff] out for special rewards leads to deterioration of morale within the Anthropology Department." Another member of the Department, Associate Professor David W. Frayer, called the raise an "undue and unwarranted" concession to the plaintiff. He further stated the following in a letter to the Vice Chancellor on September 1, 1982:

> Several years ago the Department set up a fair and equitable system for determining the amount of pay increase deserved by each faculty member. This *objective* system was based on an individual's contribution in the area of teaching, research, and service,

which was determined by a committee of three, elected by the Department. I have served on the committee a number of times and am very satisfied with the process, in that it is a fair and reasonable way of assessing the relative contributions of each faculty member. It also conforms to the policy of the University concerning promotion and tenure and, certainly, does not deviate from the principles that you wrote about in your introductory letter to the faculty last fall (August 18, 1981).

Any unpressured, objective evaluation of the teaching, research, and service contributions of Professor Dorothy Willner would arrive at the same evaluation and recommendations of the Anthropology Merit Salary Committee. Since we consider notes made during the evaluation process of the committee confidential and destroy them after the process is completed, I do not have all the data by which we made our evaluation, but my memory is relatively good. Professor Willner had one (maybe two) publications in a peer reviewed journal. She received no research grants. She advised a couple of graduate students, but did not participate in any undergraduate advising at the beginning of either semester. She taught two courses both semesters in which there were very few students and for which we had no student evaluations. For service, there was some national and international activity, but she absolutely did not participate in even a minor way in Departmental, College or University service. The evaluation of the committee ranked her low in comparison with the other *active* members of the Department and assigned her a justifiable point total which the chair-

man translated into a dollar figure. As I understand, Dean Lineberry concurred with our evaluation. Moreover, I think our evaluations in the past (since 1975 when I arrived) have been consistent with her performance, which certainly does not measure up to the activity of virtually everyone else in the Department. I would also argue that her work for the University is well below the contributions of most other members in the College and I believe that you have seen a memo from the University Counsel that clearly indicates this.

Beyond all of this, Professor Willner received an unusual, if not unprecedented, leave with full pay for the Spring 1982 semester. Certainly, you remember the consternation and cries of unfairness that this raised in the Department of Anthropology and the arguments by several of my colleagues (and myself) that this was not warranted, not deserving, and nothing more than favoritism on the part of the Dean and you. Yet, within a period of a few months, you act to give Professor Willner rewards for research, service, and teaching which the committee, duly elected by the Department, felt she did not deserve. I also understand that you did not consult the Department Chairman nor any member of the Merit Salary Committee. I also know, thanks to the UDK, that Professor Willner's salary is not high, but certainly not low in comparison to the other members of the College and with respect to her career contributions. What then is the justification for modifying the recommendations of the Merit Salary Committee, the Department Chairman, the Dean of the College?

You may think that this is all "sour grapes" and, I suppose, that some of it is. (I suspect that you have been informed of my past problems with Professor Willner.) But my complaint transcends this petty issue and concerns fairness, equal treatment, and reward for meritorious work. You stated in your letter (August 18, 1981) "K.U. has a distinguished history in teaching, research and service. This requires constant vigilance for its preservation . . . I believe that we are at a time in the life of this University when great strides can be made in reasserting the basic principles of a high-quality academic program. Indeed we can move forward to a still higher level of national and international prominence. To do so will require a strength of conviction and commitment on all our parts . . ." You have also mentioned on a number of occasions our "mission" as individuals and as members of the University. Given my arguments in this letter, is this the kind of "vigilance", the level of "conviction and commitment" that you plan to provide? Is this the way you plan to encourage the enhancement and improvement in our academic mission?

Granting Professor Willner additional pay will not affect my commitment to teaching and advising, my interest in and dedication to research, nor my service duties, but it does tell me something about your fortitude in dealing fairly with the faculty and makes me suspicious of what you truly mean when you discuss your dedication to maintaining the quality and excellence of the University of Kansas. Finally, it also tells me something about the ability we have as a Department in treating each other

equally and rewarding meritorious, well-rounded academic work. This matter completely undermines the consensus opinion by the members of the Department of Anthropology in determining relative academic contribution and its due reward. Speaking as a single voice (not for the Department), I am truly disappointed.

30. On December 1, 1982, plaintiff filed the instant action in this court.

31. The setting of plaintiff's salary was again fraught with difficulties in 1983. Plaintiff once again failed to follow departmental policy by submitting her merit salary evaluation materials to the Dean rather than to the merit salary evaluation committee. The Dean returned the materials to plaintiff and they were never submitted to the committee. The committee had difficulty assessing plaintiff's contributions in the areas of teaching and service because of the lack of the necessary materials. Nevertheless, plaintiff received an $858 salary increase. Plaintiff's salary for fiscal year 1984 became $30,255.

32. In December, 1983, the faculty was advised that materials for the merit salary evaluation for fiscal year 1985 would be due in early January. Once again, plaintiff failed to submit any materials to the merit salary evaluation committee. On January 16, 1984, Chairperson Johnson advised plaintiff that he was recommending a $1,349 salary increase for her. This was the lowest salary increase in the Department. Plaintiff's salary thus became $31,604.

33. In December, 1984, the faculty was advised that the merit salary evaluation process would soon begin. The faculty was told to submit their merit salary eval-

uation materials to the merit salary evaluation committee. On January 17, 1985, plaintiff wrote to the members of the committee and asked that they disqualify themselves from evaluating her salary because they had told the Dean in 1981 that plaintiff should be removed from the Department. Plaintiff did not submit any materials for evaluation. On January 23, 1985, Chairperson Johnson informed plaintiff that she would be receiving no salary increase for fiscal year 1986 because of her failure to comply with departmental rules. Chairperson Johnson cited the following rule to plaintiff: "In the case where a faculty member in residence fails to submit an account of his or her activities for the past year, the committee shall recommend no salary increase." Accordingly, plaintiff's salary remained at $31,604. Prior to this year, the Department's faculty members had received salary increases even if they did not submit the required materials despite the aforementioned departmental rule. Chairperson Johnson felt it was time to follow the departmental rules this year after plaintiff's continual refusal to abide by the prescribed procedures.

34. The University did not discriminate against the plaintiff because of her sex in salary determinations. Plaintiff's salary has increased from $10,000 in 1965 to $31,604 in 1985. As would be expected, the amounts of plaintiff's salary increases have varied over the years. Most of the time plaintiff's increases have generally been toward the bottom of the increases provided to the members of the Department. However, the extent of plaintiff's salary increases has always been determined by the fair application of the Department's merit evaluation system. The procedures and criteria used by the Department have been applied equally and fairly and without regard to

sex or any other illegal factor. The criteria used by the Department are systematic and objective. A merit review system, of necessity, involves judgments by people and is thus to that extent subjective. However, the criteria and standards established by the Department are as definite as possible considering the elusive nature of judging teaching ability and research and service activities. Plaintiff's salary increases have not been as large as some of the male professors in the Department because of the application of the procedures and criteria of the merit evaluation system. Plaintiff has repeatedly failed to comply with the Department's rules in the submission of materials to the committee. This has had an obvious effect on plaintiff's salary with the most significant being her denial of any raise in 1985. This requirement is fair and does not discriminate based on sex. The application of the criteria employed by the Department to evaluate salary increases has been the prime factor in the establishment of plaintiff's salary over the years. Plaintiff's teaching point totals have reflected her minimum teaching load, low enrollment in her classes, lack of teaching awards, low masters and doctorate production, and low number of student advisees. Her research activities have been about average compared to the other members of the faculty. Finally, plaintiff's service to the University and to the Department has been non-existent. Plaintiff has performed some service on the national professional level. The sum of these facts, coupled with the production of the other professors in the Department, has produced the fair and equitable salary increases received by the plaintiff over the years. The comments of plaintiff's colleagues made over the years and set forth in prior findings of fact are fully supported by the other evidence by the court, and we find them entirely credible.

35. The University, its employees, officials and agents did not retaliate against the plaintiff in any fashion because she (1) complained about sex discrimination in salary matters; (2) complained about violations of an agreement entered into between the KCCR and KU; (3) filed charges of discrimination with the EEOC; or (4) filed this action in federal court. Most of plaintiff's alleged incidents of retaliation or harassment are at best, trivial, and at worst, non-existent. Plaintiff has simply misperceived many acts of the University's administrators and colleagues as retaliation and reprisal.

36. Plaintiff's problems in the Department have arisen because of her argumentative, abusive and arrogant manner. This behavior has caused numerous difficulties for the University which has continually attempted to assist and work with the plaintiff. Over the years, plaintiff repeatedly threatened administrators and her colleagues with legal action if they did not see things her way or failed to comply with her requests. An example of plaintiff's attitude towards the University and her colleagues occurred during a telephone call from the plaintiff to the Dean of the College of Liberal Arts and Sciences on October 12, 1982. The Dean described the call as one of the most "bazarre, vicious, spiteful, vulgar conversations" he had ever experienced. Among other things, plaintiff called her colleagues in the Department a "pack of adolescent, juvenile criminals" and "creeps," referred to KU as a "ticky tacky shitty place" and a "police state University," and threatened that her complaints would "end up in the legislature."

37. Plaintiff's continual complaints during her employment did have an impact on decisionmaking at the

University. As a result of plaintiff's constant accusations and charges, the University granted plaintiff preferential treatment on several occasions.

38. The court specfiically finds that the following claims raised by the plaintiff were not retaliatory acts or harassment against the plaintiff:

a. the extent of plaintiff's salary increases;

b. discussions and votes that occurred at departmental faculty meetings;

c. allowance of leave opportunities for plaintiff;

d. omission of entries on plaintiff's curriculum vitae;

e. resolution of a student complaint against plaintiff;

f. efforts of the administration to seek information from members of the Department and to solve the problems of the Department, including those caused by the plaintiff;

g. efforts of the administration and her colleagues to resolve plaintiff's complaints about routine office services, course scheduling, room assignments, audio-visual equipment, receipt of mail, enrollment and display of books;

h. loss of a Fulbright Hays research grant;

i. low enrollment in plaintiff's classes;

j. failure of graduate students to select plaintiff as an advisor;

k. refusal of plaintiff's colleagues to allow plaintiff to record departmental meetings; and

l. failure to conduct a pro-seminar course to completion.

39. The University has spent considerable time and effort over the years to solve the problems that have existed in the Anthropology Department. There is little dispute that these problems have been caused primarily by the plaintiff and one other professor. The actions and conduct of the University show genuine concern for the plaintiff and her problems rather than an attempt to retaliate against her. Plaintiff's colleagues have also demonstrated considerable restraint over the years. They have treated her fairly and respectfully despite her sometimes vicious attacks upon them. The suggestions of her colleagues at various times over the years to members of the administration that plaintiff be removed from the Department can only be viewed as constructive suggestions given the many problems caused by the plaintiff in the Department. In sum, the court finds that the University, through its agents, did not retaliate against plaintiff because she made complaints of sex discrimination or other matters.

CONCLUSIONS OF LAW

1. The court has jurisdiction of this action pursuant to Title VII of the Civil Rights Act of 1964 and the Equal Pay Act of 1963. 42 U.S.C. §2000e-5(f); 29 U.S.C. §216.

2. Defendant University of Kansas is an employer within the definition of Title VII and the EPA. 42 U.S.C. §2000e(b); 29 U.S.C. §203(d).

3. Title VII makes it unlawful to discriminate against an employee on the basis of her/his sex or to take retaliation action against an employee who has asserted her/his rights under the Act. 42 U.S.C. §2000e-2(a) and 42 U.S.C. §2000e-3(a).

4. Title VII further provides as follows:

> It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of title 29.

42 U.S.C. §2000e-2(h).

5. The EPA provides in pertinent part as follows:

> No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex.

29 U.S.C. §206(d).

6. When the issue of salary differentials is brought under both Title VII and the Equal Pay Act, the legal standards established under the Equal Pay Act control. *Miller v. Kansas Power and Light Co.*, 585 F.Supp. 1509, 1512 (D.Kan. 1984). Thus, in order to prove her claim

of salary discrimination based on sex, plaintiff has the initial burden of proving that the University paid different wages to professors of the opposite sex for work that was substantially equal in terms of skill, effort and responsibility. *EEOC v. Central Kansas Medical Center,* 705 F.2d 1270, 1272 (10th Cir. 1983). If plaintiff establishes a prima facie case, the burden of proof shifts to the defendant to establish that the wage differential resulted from a factor other than sex or to prove the existence of one of the three other affirmative defenses. *Id.*

7. Plaintiff established a prima facie case at least with regard to some of the professors in the Department. Plaintiff demonstrated that she was paid lower wages than some of the male professors in the Department for work that was substantially equal in terms of skill, effort and responsibility.

8. The University asserted that the wage differential between plaintiff's salary and the salaries of other male professors resulted from the existence of a valid merit system. An explanation of the requirements of a valid merit system is contained in *Equal Employment Opportunity Commission v. Aetna Insurance Co.,* 616 F.2d 719, 725 (4th Cir. 1980):

> A merit system, to be recognized as valid, need not be in writing. See 29 C.F.R. §800.144 (1979). See also 109 Cong. Rec. 9203, 9208 (1963) (remarks of Reps. Griffin; Waggonner; Griffin and Goodell, respectively). Notwithstanding the absence of a writing requirement, a merit "system" must be an organized and structured procedure whereby employees are evaluated systematically according to predetermined criteria. *Brennan v. Victoria Bank and Trust Co.,*

493 F.2d 896, 901 (5th Cir. 1974); *Hodgson v. Brookhaven General Hospital,* 436 F.2d 719, 726 (5th Cir. 1970). Moreover, to be recognized, it would seem that an unwritten merit system must fulfill two additional requirements: the employees must be aware of it; and it must not be based upon sex. See 29 C.F.R. §§ 800.142, .144 (1979). *Cf. Shultz v. First Victoria National Bank,* 420 F.2d 648, 654-59 (5th Cir. 1969) (if training program exemption is to be argued, the employees should be aware of the program's existence).

9. The University carried its burden of showing that the wage differential between plaintiff's salary and some of the salaries of the male professors of the Department resulted from the existence of a valid merit system. The merit evaluation system used in the Department was at all times systematic and objective. Members of the faculty within the Department have always been aware of the system with its standards and requirements.

10. Based on the foregoing findings of fact and conclusions of law, we conclude that judgment must be entered for the defendant and against the plaintiff on plaintiff's Title VII and EPA claims of sex discrimination in salary determinations.

11. Plaintiff also contended that the University retaliated against her after she filed various complaints of sex discrimination within and outside the University. Plaintiff contended that she was retaliated against after Spring, 1972, after Spring, 1977, and after December, 1982, and that such retaliation has continued to the present time through the acts of the agents and employees of the University.

12. To prove a claim of retaliation under 42 U.S.C. §2000e-3(a), plaintiff must show that the defendant took some adverse employment action because of plaintiff's action taken against perceived employment discrimination. *Whatley v. Metropolitan Atlanta Rapid Transit Auth.*, 632 F.2d 1325 (5th Cir. 1980). In *Mitchell v. Visser*, 529 F.Supp. 1034, 1044 (D.Kan. 1981), we set forth the order of proof for a Title VII retaliation action as follows:

> First, the plaintiff must prove a prima facie case of retaliatory treatment by a preponderance of the evidence. A plaintiff demonstrates a prima facie case by showing: (1) that he engaged in protected activity, i.e., he opposed or participated in Title VII proceedings; (2) that his employer was aware of the protected activities; (3) that he was subjected to adverse employment actions; and (4) that the adverse employment actions followed his protected activities within such period of time that the court can infer retaliatory motivation. *Hochstadt v. Worcester Foundation for Experimental Biology*, [425 F.Supp. 318 (D.Mass. 1976), *aff'd*, 545 F.2d 222 (1st Cir. 1976)]; *Sutton v. National Distillers Products Co.*, 445 F.Supp. 1319 (S.D.Ohio 1978); *Bradington v. International Business Machines Corp.*, 360 F.Supp. 845 (D.Md. 1973), *aff'd*, 492 F.2d 1240 (4th Cir. 1974). If this burden is met, a mandatory presumption arises, which requires the court to enter judgment for the plaintiff if the defendant does not rebut the presumption. *Texas Dept. of Community Affairs* [*v. Burdine*, 450 U.S. 248 (1981)]. The burden then shifts to the defendant to set forth, through admissible evidence, a valid, nondiscriminatory reason for his treatment of the plain-

> tiff. If the defendant does so, then plaintiff must show that the reason advanced by defendant is a mere pretext for the kind of discrimination forbidden by Title VII. It must be emphasized that the defendant bears only a burden of production and that the burden of persuasion remains always with the plaintiff. *Id.*

Also see Burrus v. United Telephone Co. of Kansas, Inc., 683 F.2d 339, 343 (10th Cir. 1982), *cert. denied*, 459 U.S. 1071 (1982).

13. The court has considerable difficulty in concluding that the plaintiff has demonstrated a prima facie case because of the dearth of evidence showing that the plaintiff was subjected to any adverse employment actions. To the extent that any of the incidents alleged by the plaintiff can be viewed as adverse employment actions, the court finds that the University has provided substantial evidence of valid nondiscriminatory reasons for the actions taken. The vast majority of plaintiff's problems with the University and its employees have been caused by plaintiff's manner, not by the content of her complaints.

14. Based upon the foregoing findings of fact and conclusions of law, we conclude that judgment must be entered for the defendant and against the plaintiff on her Title VII claims of retaliation and reprisal.

CONCLUSION

The court's careful review of the vast amount of evidence presented in this case reveals no sex discrimination or retaliation by the University against the plaintiff. The evidence clearly demonstrates that plaintiff's salary over the years has been determined by the application of a fair and equally applied merit evaluation system. The court

could find no support for plaintiff's alleged incidents of retaliation. Many of the problems asserted by the plaintiff were caused by her own abusive and arrogant manner. In other instances, plaintiff simply misperceived trivial matters as incidents of retaliation. If anything, plaintiff has received favorable treatment from the University over the years in an effort to placate her. The court hopes that this opinion will put to rest the unrest that has existed in the Department of Anthropology for the past fifteen years. We recognize, however, that there is little hope for such reconciliation until plaintiff is willing to accept the responsibility for the turmoil that has occurred in the Department.

IT IS THEREFORE ORDERED that judgment be entered for the defendant and against the plaintiff on plaintiff's Title VII and EPA claims.

IT IS SO ORDERED.

Dated this 16th day of September, 1986 at Topeka, Kansas.

/s/ Richard D. Rogers
United States District Judge

(Filed January 6, 1987)

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

CIVIL ACTION
NO. 85-2288-S

DOROTHY WILLNER,
Plaintiff,

v.

GENE BUDIG, et al.,
Defendants.

MEMORANDUM AND ORDER

This matter is before the court on defendants' motion for summary judgment and plaintiff's submission of a pleading entitled "Petition for Correction of Factually Erroneous Material Misstatement in the Court's Order of November 19, 1986, and for Reconsideration."

Plaintiff spends a considerable amount of time in her petition for correction of a material misstatement in the Court's Order of November 19, 1986, specifically when the court states the basis of her appeal in *Dorothy Willner v. University of Kansas*, Case No. 82-4291-S. On review of the Court's Memorandum and Order filed on November 19, 1986, the court clearly did not erroneously misstate the decision and/or orders which are being appealed. The court stresses to the plaintiff that it is unnecessary to state the full caption; rather a cite to the first plaintiff and first defendant's name and case number suffices in

citing to a case. The court finds that it did correctly cite to the appeal in Case No. 82-4291. The court is cognizant of the fact that this same case is docketed as Case No. 86-2678 in the United States Court of Appeals for the Tenth Circuit. The court is uncertain in what other manner plaintiff thinks the court misstated her appeal. The court does recognize that plaintiff has not only raised on appeal the trial court's judgment of September 16, 1986, but raises other issues such as some preliminary orders entered by the court. The court finds, however, that this in no way constitutes a material misstatement as alleged in plaintiff's pleading filed November 24, 1986. Thus, the court finds that plaintiff's argument that the Court's Order dated November 19, 1986, should be reversed because of this "misstatement" has no merit.

The plaintiff also seeks the court's reconsideration of the Court's Memorandum and Order filed on November 19, 1986, denying plaintiff a 30-day extension. The court finds that plaintiff's motion for reconsideration should be denied. The court is getting tired of continuously admonishing plaintiff to timely prosecute this action and to avoid delaying this case further. As the court has repeatedly started to the plaintiff that while it is aware of plaintiff's health problems, plaintiff has brought this lawsuit on her own volition and must be responsible for prosecuting said action. Plaintiff remains unmindful of the stress that defendants face in defending such long and protracted litigation. The court therefore finds that plaintiff's motion for reconsideration should be denied. Accordingly, the court will now consider defendants' motion for summary judgment.

A moving party is entitled to summary judgment only when the evidence indicates that no genuine issue of ma-

terial fact exists. Fed. R. Civ. P. 56(c); *Maughan v. SW Servicing, Inc.*, 758 F.2d 1381, 1387 (10th Cir. 1985). An issue of fact is "material" only when the dispute is over facts that might affect the outcome of the suit under the governing law. *Anderson v. Liberty Lobby, Inc.*, 54 U.S.L.W. 4755, 4757 (U.S. June 25, 1986). The requirement of a "genuine" issue of fact means that the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Id.* Thus, the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment. *Id.* The court must consider factual inferences tending to show triable issues in the light most favorable to the existence of those issues. *United States v. O'Block*, 788 F.2d 1433, 1435 (10th Cir. 1986). The court must also consider the record in the light most favorable to the party opposing the motion. *Bee v. Greaves*, 744 F.2d 1387, 1396 (10th Cir. 1984), *cert. denied*, 105 S. Ct. 1187 (1985). The language of Rule 56(a) mandates the entry of summary judgment against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 54 U.S.L.W. 4775, 4777 (U.S. June 25, 1986).

Defendants base their motion for summary judgment on the fact that plaintiff's suit should be barred by principles of collateral estoppel, res judicata, and issue and claims preclusion based on the judgment entered in *Dorothy Willner v. University of Kansas*, Case No. 82-4291 (D. Kan., *unpublished*, Sept. 16, 1986). Defendants further urge that there is no evidence to support claims being asserted against defendant Gene Budig. Defen-

dants contend that the federal civil rights claims brought against the defendants in their official capacities are barred by the Eleventh Amendment; and that Title IX, 20 U.S.C. § 1681(a) allows no private cause of action for damages against the defendants. Defendants further claim that plaintiff's section 1983 claims are not actionable because 42 U.S.C. § 2000e constitutes plaintiff's exclusive remedy for alleged sex discrimination in employment. As far as the state laws alleged by plaintiff, defendants claim that said claims are barred by the applicable statutes of limitations, as well as plaintiff's failure to adequately prove her common-law claim of slander and fraud. Finally, defendants argue that defamation is not a federal right actionable under 42 U.S.C. § 1983.

While plaintiff states in her response to defendants' motion for summary judgment that defendants' statement of material facts are controverted, plaintiff does not go beyond the pleadings and designate by her own affidavits or depositions, designate specific facts showing that there is a genuine material issue of fact for trial. *See Celotex v. Catrett*, 54 U.S.L.W. 4775, 4777 (U.S. June 25, 1986). The court therefore deems said statements of fact to be uncontroverted for the purposes of the summary judgment motion. The court will not reiterate said facts in this memorandum and order.

The defendants concede that plaintiff's action in *Dorothy Willner v. University of Kansas* did not involve the same defendants as the present case. Defendants argue, however, that the present suit should be dismissed as each of the six individual defendants in the present case are officials or employees of the University of Kansas, a defendant in the earlier case. Defendants cite to the fact that plaintiff heavily relied on this earlier case

in answering interrogatories, witness and exhibit lists, and was heavily cited in her deposition testimony, thus supporting the conclusion that plaintiff is raising substantially identical issues and related facts from the earlier action to the present action.

Res judicata includes both "claim preclusion" and "issue preclusion." Claim preclusion essentially treats a judgment, once rendered, as the full measure of relief to be accorded between the same parties in the same "claim" or "cause of action." Claim preclusion forbids a party from twice litigating the same cause of action, and this rule applies not only to questions which were presented and decided, but to every question which might have been presented and decided. *Thompson-Hayward Chemical Co. v. Cyprus Mines Corp.*, 660 P.2d 973, 975 (Kan. App. 1983). In determining whether the claim which plaintiff asserts in the instant case is the same as inserted in the earlier action, the test is whether the primary right and duty and delict or wrong is the same in each action. *Id.* at 977.

In the decision of *Gensen v. Federal Land Bank Assoc. of Ness City, Ks.*, No. 85-4068 (D. Kan., *unpublished*, April 26, 1985), the court held that even if the present defendants were not parties to the early action, the Kansas courts would apply the Restatement (Second) Judgments § 51 which states in pertinent part:

> If two persons have a relationship such that one of them is vicariously responsible for the conduct of the other, and an action is brought by the injured person against one of them, the judgment in the action has the following preclusive effects against the injured person in a subsequent action against the other:

(1) A judgment against the injured person that bars him from reasserting his claim against the defendant in the first action extinguishes any claim he has against the other person responsible for the conduct unless:

(a) The claim asserted in the second action is based upon grounds that could not have been asserted against the defendant in the first action; or

(b) The judgment in the first action was based on a defense that was personal to the defendant in the first action.

Slip op. at 5-6.

In *Mertes v. Mertes*, 350 F. Supp. 472 (three-judge court, 1972) *aff'd*, 411 U.S. 961, (1973) the court stated: "[r]es judicata may be invoked against a plaintiff who has previously asserted essentially the same claim against different defendants where there is a close or significant relationship between successive defendants." *Id.* at 475. Thus, the court must determine whether the earlier action bars a suit between the present parties' action. In resolving this issue, the court must examine whether there is a significant relationship between the earlier defendants and the present defendants, or whether the present defendants are privies to the party defendants in the earlier action. The court notes that collateral estoppel precludes relitigation of issues already litigated in the prior suit, regardless of whether based on the same cause of action. *St. Louis Baptist Temple v. FDIC*, 605 F.2d 1169, 1174 (10th Cir. 1979).

The Kansas Supreme Court recently has stated that there must be a concurrence of four conditions to evoke the doctrine of res judicata: (1) identity in the things

sued for, (2) identity of the cause of action, (3) identity of persons and parties to the action, and (4) identity in the quality of the persons for or against whom the claim is made. *McDermott v. Kansas Public Serv. Co.*, 238 Kan. 462, 473 (1986). The court restated the general rule that a former adjudication is binding only on the parties and their privies. In *St. Louis Baptist Temple,* the Tenth Circuit discussed the doctrine of "privity." The Tenth Circuit held that there is no definition of privity which can be automatically implied in cases involving the issue of res judicata and/or collateral estoppel. The court further stated that: "[p]rivity requires, at a minimum, a substantial identity between the issues in controversy and showing that the parties in the two actions are really in substantially in interest the same." 605 F.2d at 1174 (cites omitted).

In ruling on whether plaintiff is precluded from bringing her section 1983 and section 1985 actions against these defendants, the court must distinguish between plaintiff's claim against these defendants in their individual capacities and their representative capacities as agents of the University of Kansas. The decision in *Morgan v. City of Rawlins,* 792 F.2d 975, 980 (10th Cir. 1986), distinguished the application of the doctrine of res judicata in cases where the defendant is sued in his representative capacity and where he is sued personally as an individual. The court found that the defendant's presence in the second suit when he is named for actions for which he allegedly was personally responsible is not barred by the doctrine of res judicata, as there is no finding of privity. *Id.* at 980. Similarly, when the court considers the doctrine of res judicata in the present case, it is considering only plaintiff's claims against the six individual defendants in their

representative capacity as agents of the University of Kansas. This court will summarily dismiss defendants' claim that res judicata or collateral estoppel bars plaintiff's claim against the individual defendants in their individual capacities.

The court will now consider whether the doctrines of res judicata or collateral estoppel should bar plaintiff's claim under 42 U.S.C. § 1983. In comparing the plaintiff's amended complaint to the Memorandum & Order filed on September 16, 1986, by the Honorable Richard Rogers, the court is convinced that the issues presented by this litigation are in substance the same as those resolved against the plaintiff in *Willner v. University of Kansas*, Case No. 82-4291. On page 23 of Judge Rogers' slip opinion, the court specifically found that the following claims raised by the plaintiff were not retaliatory acts or acts of harassment against the plaintiff:

a. the extent of plaintiff's salary increases;

b. discussions and votes that occurred at departmental faculty meetings;

c. allowance of leave opportunities for plaintiff;

d. omission of entries on plaintiff's curriculum vitae;

e. resolution of a student complaint against plaintiff;

f. efforts of the administration to seek information from members of the department and to solve the problems of the department, including those caused by the plaintiff;

g. efforts of the administration and her colleagues to resolve plaintiff's complaints about routine office services, course scheduling, room assignments, au-

dio-visual equipment, receipt of mail, enrollment and display of books;

h. loss of a Fulbright Hays research grant;

i. low enrollment in plaintiff's classes;

j. failure of graduate students to select plaintiff as an advisor;

k. refusal of plaintiff's colleagues to allow plaintiff to record departmental meetings; and

l. failure to conduct a pro-seminar course to completion.

Plaintiff's amended complaint, paragraph 9(a) through (i), alleges substantially identical facts as a basis of harassment and retaliation. The court finds that the plaintiff had a full and fair opportunity to litigate the issues upon which she bases her section 1983 claims in the prior federal case against those defendants. The court further finds the named defendants in the prior action have interests which are significantly related to those of the defendants in the present action. The court specifically finds that all six defendants are employees and agents of the University of Kansas and are in privity with their employer, University of Kansas, who previously obtained a judgment on the merits against the plaintiff. In *Willner v. University of Kansas*, No. 82-4291, the University necessarily represents the legal interests of its officials, employees, and agents, who were persons alleged by plaintiff to have committed the acts of retaliation against her, in both the earlier suit and the present suit. The interests of the defendant University in the first action and the individual defendants in the present action are the same. Therefore, plaintiff should not be heard upon the same

issues relating to these defendants in their representative capacity. In so ruling, the court is mindful of the length of and extensive evidence presented in the trial in Case No. 82-4291.

The plaintiff brought the earlier action pursuant to Title VII, 42 U.S.C. § 2000e and the Equal Pay Act, 29 U.S.C. § 206(d). While the court notes that plaintiff has brought this action for claims under 42 U.S.C. § 1983 rather than Title VII, it is clear that when a second suit is brought against the same parties or their privities, the final judgment in the prior action is conclusive as to all matters which were actually litigated, as well as those which could have been litigated. *See Spence v. Latting*, 512 F.2d 93, 98 (10th Cir. 1975). The court finds that the purpose of the doctrine of res judicata is to prevent just such a case which constitutes a repetitive suit involving the same causes of action.

The court notes that one of the specific determinations made in the decision of *Willner v. University of Kansas*, No. 82-4291, was that the "University, its employees, officials, and agents did not retaliate against the plaintiff in any fashion because she complained about sex discrimination and salary matters, complained about violations of an agreement entered into between the KCCR and KU, filed charges of discrimination with the EEOC, or filed this action in federal court." Slip op. at 22. The court also notes that during plaintiff's lengthy trial in the prior action, the court enabled her to bring all facts to light in the record, from her initial complaint to the present, so that plaintiff would be given a full opportunity to litigate all wrongs she felt that those defendants had committed against her.

Defendants also argue that plaintiff's section § 1983 claims are not actionable because an action under Title VII, 42 U.S.C. § 2004 is her exclusive remedy. The court must agree. The decision in *Day v. Wayne County Board of Auditors*, 749 F.2d 1199, 1202-03 (6th Cir. 1984) is persuasive. The Sixth Circuit extensively discussed the Congressional intent in enacting both Title VII and § 1983. The court found that while this area is not without doubt, "Title VII provides the exclusive remedy when the only § 1983 cause of action is based on a violation of Title VII." *Id.* at 1204 (citing *Great American Federal Savings & Loan Association v. Novotny*, 422 U.S. 366, 375-76 (1979)). The court finds that plaintiff has not convinced this court that her § 1983 claims are based on any constitutional violation other than an unemployment practice covered by Title VII. *See Day*, 749 F.2d at 1204-05. The court further notes that defamation, or slander, is insufficient to provide redress under section 1983. *Collins v. Cundy*, 603 F.2d 825, 827 (10th Cir. 1979). This is true even when defamation is committed by state officials. *Taylor v. Nichols*, 409 F. Supp. 927, 934 (D. Kan. 1976), *aff'd*, 558 F.2d 561 (10th Cir. 1977). The plaintiff therefore cannot allege a section 1983 action based on statements made by the defendants. The court therefore finds that defendants' motion for summary judgment on plaintiff's claims under section 1983 against them in their individual capacities is hereby granted.

The court further finds that under standard enumerated in *Celotex* and *Anderson*, plaintiff has failed to establish the elements necessary to prove the existence of conspiracy involving the named defendants. The Tenth Circuit has held that mere conclusory allegations of a conspiracy, with no supporting factual averments, are insufficient to state a claim under section 1985.

The court first notes that the court has previously held that a university and its officials, acting in their official capacity, constitutes a single entity that cannot conspire with itself. *See Barger v. State of Kansas,* No. 85-4006, slip op. at 5-6 (D. Kan., *unpublished,* Nov. 4, 1985). Thus, plaintiff does not state a claim under §§ 1985(2) and 1986 against defendants in their representative capacity. The court, however, has refused to extend this rule to those defendants acting in their individual capacities. *Id.* at 6.

While the court finds that it is not required to give plaintiff further opportunity to respond to defendants' motion for summary judgment on plaintiff's claim under 42 U.S.C. § 1985 and § 1986 against defendants in their individual capacities, the court chooses to do so. The court has offered every consideration to the plaintiff due to her pro se status. The court realizes from reading plaintiff's response to defendants' motion for summary judgment that plaintiff is unaware of the recent decisions in *Anderson v. Liberty Lobby, Inc.,* 54 U.S.L.W. 4755 (U.S. June 25, 1986), and *Celotex Corp. v. Catrett,* 54 US.L.W. 4775 (U.S June 25, 1986) These cases make clear, as stated in our earlier discussion of the standard in ruling on a motion for summary judgment, that the nonmoving party must go beyond the pleadings and by her own affidavits or by the depositions, answers to interrogatories and admissions on file, designate specific facts showing that there is a genuine issue for trial. *Celotex,* 54 U.S.L.W. at 4777.

The court finds that the defendants have met their burden in demonstrating their belief that elements essential to the plaintiff's case are absent. The court, there-

fore, finds that plaintiff has to demonstrate specific facts showing that there is a genuine issue for trial and must make a sufficient showing that she has estaablished the essential elements necessary to bring her causes of action under § 1985 and 1986 against defendants in their individual capacities.

The court would also point out to the plaintiff that the decision in *Anderson v. Liberty Lobby, Inc.*, 54 U.S.L.W. 4755 (U.S. June 25, 1986), imposes upon the plaintiff bringing an action for fraud the burden to defend against a summary judgment motion by presenting evidence such that a court could find a jury might return a verdict in her favor. *Anderson* also mandates that when ruling on a motion for summary judgment on plaintiff's claim for fraud, the court must view the evidence under the clear and convincing evidentiary standard in determining whether a genuine issue of actual malice exists. 54 U.S. L.W. at 4760.

The court being ever mindful of plaintiff's right to a full opportunity to litigate her claims, directs the plaintiff to submit within fifteen (15) days from the date on which this order is filed, any evidence or specific facts which establish the elements necessary to state a cause of action under section 1985 and 1986 against the individual defendants, as well as her claims for slander, fraud, intentional infliction of emotional distress, her tort claims of willful and intentional fraudulent interference with economic relations, and outrage. Plaintiff's failure to do so will result in the granting of defendants' summary judgment motion. As a final note, the court finds no private right of action available under 20 U.S.C. § 1681(a) and thus summarily grants defendants' motion for summary judgment on this claim.

IT IS BY THE COURT THEREFORE ORDERED that defendants' motion for summary judgment on plaintiff's claims against the individual defendants in their representative capacities, under sections 1983, 1985 and 1986, is hereby granted under the doctrines of res judicata and collateral estoppel. IT IS FURTHER ORDERED that defendants' motion on plaintiff's claims under § 1983 against the defendants in their individual capacities is hereby granted. IT IS FURTHER ORDERED that defendants' motions for summary judgment on plaintiff's claim under 20 U.S.C. § 1681(a) is hereby granted.

The court will take the remaining issues of defendant's motion for summary judgment under advisement pending receipt of plaintiff's additional response. Plaintiff is directed to file within 15 days of the date on which this Memorandum & Order is filed, a response including sufficient evidence to establish the elements necessary to state her causes of action.

IT IS FURTHER ORDERED that plaintiff's petition for correction of factual, erroneous, material misstatement in the Court's Memorandum and Order of November 19, 1986, and for motion for reconsideration of the Court's Order denying plaintiff an extension is hereby denied.

DATED: This 6th day of January, 1986, at Kansas City, Kansas.

/s/ Dale E. Saffels
Dale E. Saffels
United States District Judge

(Filed February 10, 1987)

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

CIVIL ACTION
NO. 85-2288-S

DOROTHY WILLNER,
Plaintiff,

v.

GENE BUDIG, et al.,
Defendants.

MEMORANDUM AND ORDER

This matter is before the court on the remaining issues of defendants' motion for summary judgment, taken under advisement pending receipt of plaintiff's additional response. The court is now in receipt of plaintiff's additional response, as well as her two motions for reconsideration and reversal of the Court's Memorandum and Order of January 6, 1987, and plaintiff's memorandum in opposition to defendants' motion for summary judgment.

The court will first address plaintiff's motion for reconsideration and reversal of the Court's Memorandum and Order of January 6, 1987. The court finds that plaintiff's motions for reconsideration and reversal have no merit and do not warrant an in-depth discussion about her contentions. The court is not going to reiterate its argument as to the citing of her appeal in *Willner v. University of Kansas,* No. 82-4291. Again, the court finds that plain-

tiff's arguments are without merit. The court also notes that plaintiff continually reiterates the fact of Judge Rogers' alleged erroneous rulings, issues not before this court. The court therefore finds that plaintiff's motions for reconsideration and reversal of the Court's Memorandum and Order of January 6, 1987, should be and are, denied.

In response to the Court's Memorandum and Order filed on January 6, 1987, the plaintiff seeks to remedy defects in her earlier response to the motion for summary judgment by attaching an affidavit to the end of the pending motions for reconsideration and reversal. Plaintiff also did attempt to cure the defects in her earlier response by submitting a memorandum in opposition, as well as attached exhibits. The court will briefly discuss defendants' motion as to the remaining issues of plaintiff's complaint.

The court first addresses plaintiff's fraud allegations. As cited in its Memorandum and Order of January 6, 1987, the decision in *Anderson v. Liberty Lobby, Inc.*, 54 U.S.L.W. 4755, 4759, mandates that this court view the evidence presented by the plaintiff by the clear and convincing evidence standard required in presenting such a fraud claim to the jury. The court finds that the record is void of any evidence which would support a reasonable jury finding that plaintiff has shown the elements of fraud by clear and convincing evidence. The court therefore finds that defendants' motion for summary judgment on plaintiff's state law claim for fraud should be granted.

Plaintiff has also alleged an action for slander. Plaintiff does make reference to the testimony of William McVey and Nancy Sempolski who allegedly disclosed

under oath in Case No. 82-4291, evidence of slander against the plaintiff, including the term "incestuous lesbian." The court notes that even after plaintiff was given additional time in which to respond, plaintiff has failed to attach any copies of the transcript from her earlier trial to support her claim that the named defendants in this case committed any type of slander against the plaintiff. The court therefore finds that defendants' motion for summary judgment on plaintiff's claim for slander should be granted. The exhibits attached to plaintiff's memorandum in opposition directly negate any support for finding the named defendants liable for slander.

Plaintiff also alleged, in her amended complaint, a cause of action for the tort of an intentional infliction of emotional distress. The gravamen of the tort is the intentional or reckless causing of severe emotional distress by extreme or outrageous conduct. In order for the conduct to be considered extreme or outrageous, the defendants must have had prior knowledge of facts, indicating a high degree of risk to another, and then act without regard to that risk. *See Young v. Hecht,* 3 Kan. App. 2d 510, 514, 597 P.2d 682 (1979). The court finds that plaintiff has not sufficiently plead nor proven the elements needed to recover under the tort of intentional infliction of emotional distress. The court finds that the plaintiff has not alleged any conduct or act by the defendants that would constitute extreme or outrageous conduct. The court therefore finds that defendants' motion for summary judgment on plaintiff's claim for intentional infliction of emotional distress is hereby granted.

The remaining claims upon which defendants request summary judgment are plaintiff's claims under 42 U.S.C.

§§ 1985 and 1986. In bringing an action under 42 U.S.C. § 1985(3), plaintiff must plead and prove: (1) the existence of conspiracy, (2) that defendants intended to deprive plaintiff equal protection of laws or equal privileges and immunities under the laws, (3) injury or deprivation of federally-protected right, (4) an overt act in furtherance of the conspiracy, and (5) some class-based insidious discriminatory animus behind conspirator's action. *See Colon v. Lomelo*, 575 F. Supp. 664, 668 (S.D. Fla. 1983).

The plaintiff's evidence does not demonstrate that there is a material issue of fact which exists precluding summary judgment. Specifically, even when viewing the evidence proffered by the plaintiff in the most favorable light, the plaintiff does not establish that the individual defendants conspired to deprive plaintiff of her constitutional rights.

Even after viewing plaintiff's attached exhibits, including defendants' answers to interrogatories and University communications and correspondence, the court finds that there is no evidence to establish that defendants sought to deprive plaintiff of the equal protection of the law or her right to equal privileges and immunities under the Constitution. Rather, the record indicates that a part of the dispute in the Anthropology Department stemmed from the faculty's displeasure with plaintiff's receiving allegedly unfair advantages, including plaintiff's paid leave in the Spring of 1982. In addition, the record is void of any evidence that establishes that defendants' conduct was based on sexual discriminatory animus. Plaintiff's exhibit does raise an inference that Felix Moos had allegedly sexually harassed students.

Plaintiff's cause of action, however, cannot be based on any alleged sexual harassment suffered by others.

The court's reading of the plaintiff's exhibits also convinces this court that most of the disagreements which occurred between Dr. Willner and other faculty members were brought on by Dr. Willner herself. The record indicates that the University and its faculty made every effort to accommodate Dr. Willner's requests, even to the disadvantage of other faculty members. There is also no evidence which supports plaintiff's allegations that the individual defendants' conduct was based on race or religious discrimination.

The court finds that the plaintiff should have alleged and proven, with some degree of particularity, the existence of overt acts by each of the defendants which relate to the promotion of the conspiracy claimed. She has failed to do so.

As the court finds that there is no valid claim under 42 U.S.C. § 1985, plaintiff cannot bring a cause of action under 42 U.S.C. § 1986 against the individual defendants. *See Santistevan v. Loveridge,* 732 F.2d 116, 118 (10th Cir. 1984). *See, e.g., Phillips v. Fisher,* 445 F. Supp. 552, 555 (D. Kan. 1977). The court therefore finds that defendants' motion for summary judgment as to plaintiff's claims under 42 U.S.C. §§ 1985 and 1986 against the defendants in their individual capacities should be granted.

IT IS BY THE COURT THEREFORE ORDERED that plaintiff's motions for reconsideration and reversal of the Court's Memorandum and Order of January 6, 1987, are hereby denied. IT IS FURTHER ORDERED that defendants' motion for summary judgment as to plaintiff's claims under 42 U.S.C. §§ 1985 and 1986 against the de-

fendants in their individual capacities is hereby granted. IT IS FURTHER ORERED that defendants' motion for summary judgment as to plaintiff's state law claims for fraud, slander, and intentional infliction of emotional distress is hereby granted.

In conclusion, the court finds that defendants' motion for summary judgment as to all of plaintiff's claims against them, both in their representative and individual capacities, is hereby granted. The case is hereby dismissed.

DATED: This 10th day of February, 1987, at Kansas City, Kansas.

/s/ Dale E. Saffels
Dale E. Saffels
United States District Judge

(Filed April 29, 1987)

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

CIVIL ACTION
NO. 85-2288-S

DOROTHY WILLNER,
Plaintiff,

v.

GENE BUDIG, et al.,
Defendants.

MEMORANDUM AND ORDER

This matter is before the court on plaintiff's motion for review of taxation of costs. The court has received plaintiff's response and is now prepared to rule.

This court summarized the standards for assessment of costs in *Miller v. City of Mission, Ks.*, No. 77-2259 (D. Kan., *unpublished*, July 1, 1981).

> Costs are assessed pursuant to Rule 54(d), Federal Rules of Civil Procedure, and 28 U.S.C. § 1920. The Tenth Circuit has held that "there is a presumption that the prevailing party shall recover costs, and that some person may appear for penalizing the prevailing party if costs are to be denied." *True Temper Corporation v. CF&I Steel Corp.*, 601 F.2d 495, 509-10 (10th Cir. 1979). However, the United States Supreme Court has said: "[T]he discretion given to

> district judges to tax costs should be sparingly exercised with reference to expenses not specifically allowed by statute." *Farmer v. Arabian American Oil Co.*, 379 U.S. 227, 235 (1964).

Id. at 8.

The defendants seek to recover costs for the taking of the plaintiff's deposition. Title 28, United States Code, Section 1920(2) allows for taxation of costs for "fees to the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case." The standard used to determine if deposition expenses can be taxed as costs is generally whether the court can conclude that the depositions were "necessarily obtained for use in the case." *Miller v. City of Mission, Ks.*, slip op. at 10. The court notes that the deposition need not actually be used in trial to meet the test under *Miller*. *See Nissho-Iwai Co., Ltd. v. Occidental Crude Sales*, 729 F.2d 1530, 1553 (5th Cir. 1984). All that is necessary is that the deposition appeared to have been reasonably necessary at the time it was taken. *George R. Hall, Inc. v. Superior Trucking Co.*, 532 F. Supp. 985 (N.D. Ga. 1982). The court finds that the deposition of the plaintiff was reasonably necessary at the time it was taken. The court therefore finds that costs in the amount of $1,004.25 were properly assessed by the clerk of the court.

The defendants have also filed a motion for attorneys' fees at the rate of $85.00 per hour. Defendants' counsel have stated that they will submit an affidavit with supporting time records. In ruling on this issue, the court is guided by the United States Supreme Court decision in *Christiansburg Garment Company v. E.E.O.C.*, 434 U.S. 412 (1978). In that case, the United States Supreme Court

determined whether a prevailing defendant could be awarded attorneys' fees in a Title VII action. The Supreme Court held that a district court may, in its discretion, award attorneys' fees to a prevailing defendant in a Title VII case upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in bad faith. Hence, a plaintiff should not be assessed attorneys' fees against her unless a court finds her claim was frivolous, unreasonable or groundless, or that a plaintiff continued to litigate after it clearly became so. *Id.* at 421. The court finds that based on the record of this case, defendants should be awarded a limited amount of attorneys' fees. In viewing the record of the case, and keeping in mind plaintiff's pro se status, the court finds at the very least that plaintiff should have recognized that her claims were unreasonable and without foundation after judgment was entered in *Dorothy Willner v. University of Kansas*, Case No. 82-4291, on September 16, 1986. As the Court noted in its Memorandum and Order filed on January 6, 1987, many of the claims raised by the plaintiff in the present case were specifically addressed and ruled on in *Willner v. University of Kansas*, Case No. 82-4291. *See* slip op. at 9-10. While plaintiff, in the present case, raised these claims against individual defendants, the ruling was clearly applicable. The court therefore finds that defendant's motion for attorneys' fees should be granted. The court directs the defendants' counsel to submit an affidavit and itemization of attorneys' fees and costs for the time period from September 16, 1986 to the present. The plaintiff will be given the opportunity to respond as to her objections to said stated fees within 10 days of her receipt of that affidavit. The court will then determine the amount of attorneys' fees to be awarded to the defendants.

IT IS BY THE COURT THEREFORE ORDERED that plaintiff's motion for a review of the costs assessed by the clerk of the court is hereby denied. IT IS FURTHER ORDERED that defendants' motion for attorneys' fees is hereby granted. Defendants are directed to submit an affidavit and itemization of attorneys' fees incurred from September 16, 1986 in defending this action. Plaintiff is directed to file any objections to said itemization and affidavit within 10 days of receipt of that itemization and affidavit. The court will then determine the amount of attorneys' fees to be awarded to the defendants.

DATED: This 29th day of April, 1987, at Kansas City, Kansas.

/s/ Dale E. Saffels
Dale E. Saffels
United States District Judge

AUGUST 18, 1988.

Before the Honorable Eugene A. Wright, Honorable Arthur L. Alarcon and Honorable Cynthia Holcomb Hall, Circuit Judges, United States Court of Appeals.

No. 86-2678

DOROTHY WILLNER,
Plaintiff-Appellant,

vs.

UNIVERSITY OF KANSAS,
Defendant-Appellee.

This matter comes on for consideration of plaintiff-appellant's petition for rehearing filed June 16, 1988.

Upon consideration thereof, the petition is denied.

/s/ Robert L. Hoecker
Robert L. Hoecker
Clerk

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT
United States Courthouse
Denver, Colorado 80294

Robert L. Hoecker (303) 844-3157
Clerk FTS 564-3157

August 19, 1988

Ms. Dorothy Willner
2112 Terrace Road
Lawrence, KS 66044

Re: 86-2678, Willner v. University of KS
(Lower docket: 82-4291,)

Dear Ms. Willner:

Enclosed is a copy of an order entered today in the captioned case.

Please call this office if you have any questions.

Sincerely yours,

Robert L. Hoecker
Clerk

By: /s/ Lynn Balzano
Deputy Clerk

RLH:lwb

Enclosure

cc:

Rose Marino
Clifford T. Mueller
J. Steven Pigg

AUGUST 18, 1988.

Before the Honorable Eugene A. Wright, Honorable Arthur L. Alarcon and Honorable Cynthia Holcomb Hall, Circuit Judges, United States Court of Appeals.

Nos. 87-1249 and
87-1869

DOROTHY WILLNER,
Plaintiff-Appellant,

vs.

GENE BUDIG, F. ALLAN HANSON, ALFRED E. JOHNSON, ROBERT L. LINEBERRY, ROBERT J. SMITH and DEANELL TACHA,
Defendants-Appellees.

This matter comes on for consideration of plaintiff-appellant's petition for rehearing filed June 20, 1988.

Upon consideration thereof, the petition is denied.

/s/ Robert L. Hoecker
Robert L. Hoecker
Clerk

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT
United States Courthouse
Denver, Colorado 80294

Robert L. Hoecker (303) 844-3157
Clerk FTS 564-3157

August 19, 1988

Ms. Dorothy Willner
2112 Terrace Road
Lawrence, KS 66044

Re: 87-1249, Willner v. Budig
(Lower docket: 85-2288,)
87-1869, Willner v. Budig
(Lower docket: 85-2288,)

Dear Mr. Willner:

Enclosed is a copy of an order entered today in the captioned case.

Please call this office if you have any questions.

Sincerely yours,

Robert L. Hoecker
Clerk
By:
Deputy Clerk

RLH:lwb

Enclosure

cc:

Robert T. Stephan, Attorney General
Rose Alida Marino
J. Steven Pigg
Clifford T. Mueller

(Filed August 30, 1984)

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Case No. 82-4291

DOROTHY WILLNER,
Plaintiff,

vs.

UNIVERSITY OF KANSAS, ARCHIE R. DYKES, DELBERT M. SHANKEL, FRANCES D. HOROWITZ, ROBERT P. COBB, ROBERT S. HOFFMAN, ROBERT J. SQUIER, ANTA MONTET WHITE, FELIX MOOS, JOHN M. JANZEN, MICHAEL CRAWFORD, DAVID FRAYER and DONALD STULL,
Defendants.

ORDER

This matter is presently before the court upon plaintiff pro se's request for a protective order halting defendants' deposition of plaintiff upon oral examination.

After hearing the arguments of the parties, the court will allow plaintiff a delay of two days until 9:00 a.m. on July 25, 1984, when the deposition of plaintiff will begin again and continue from day to day until it is completed.

In answer to the oral inquiry by plaintiff concerning whether the court had yet ruled on plaintiff's motion to

request the court to disqualify itself, previously filed in October, 1983, the court now rules and denies plaintiff's motion.

IT IS SO ORDERED.

Dated this 23rd day of July, 1984, at Topeka, Kansas.

/s/ Richard D. Rogers
United States District Judge

(Filed September 21, 1984)

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Case No. 82-4291

DOROTHY WILLNER,
Plaintiff,

v.

UNIVERSITY OF KANSAS, et al.,
Defendants.

MOTION FOR EXTENSION OF TIME

COMES NOW plaintiff pro se Dorothy Willner and, pursuant to F.R.Civ.P., 6(b) and Local Rule 15, respectfully requests the Court to extend for a period of 45 days the dates laid down in the scheduling order filed July 18, 1984. In support hereof, plaintiff states:

1. Her own concern is the Court's ruling which set October 1, 1984 as the date for exchange of proposed exhibits and lists of witnesses and the filing of said lists with the Clerk. When plaintiff pro se accepted as reasonable said date proposed by the Court at a scheduling conference held on July 17, 1984, she did not expect to be subject to deposition upon oral argument during the next 30 days. She did expect that counsel who had held her documents from June 1, 1984 until July 11, 1984 would make an

entry of appearance on her behalf or else arrange for same before the end of August, 1984.

2. Said deposition upon oral argument began July 18, 1984 and lasted until August 16, 1984 when it was adjourned by the Court. During this period, plaintiff was either being subject to deposition and continual requests for document production or else she was in convalescence from same in anticipation of their continuance. During most of said deposition, plaintiff pro se experienced back spasms and migraine headaches which she endured beyond the limits of her capacity to withstand said pain stoically and to the point where said deposition truly threatened her health.

3. Immediately after said deposition was adjourned on August 16, plaintiff had to cope with motions filed by defendants during the period of deposition and with other matters which came up in the course of deposition and until the end of August. Plaintiff pro se endeavored to respond timely, within the limits of her capacities, to all motions and orders filed during said period. She succeeded to her best abilities, having filed the last motion responsive to defendants and the Court on September 18, 1984, the morning of the hearing called by Honorable Richard D. Rogers on the motion to dismiss filed by individual defendants August 10, 1984. Said effort exhausted plaintiff's already depleted energies.

4. Furthermore, the Jewish High Holy Day period is scheduled to begin on September 26, 1984 and continue until October 7. Not yet having her own documents in order or having completed inspection and copying of defendants' documents, plaintiff sees no possibility of preparing a list of proposed exhibits by October 1. Plain-

tiff submitted more than 550 deposition exhibits, some consisting of multiple pages, but said documents do not include the range of exhibits relevant to plaintiff's claims in her case.

5. Plaintiff pro se had not herself intended to request a 45 day extension of the other dates set forth by the Court in its scheduling order. However, since defendant counsel made this a condition of their approval of plaintiff pro se's request, she herewith requests said extension of the date of November 30 for discovery under Rules 33 and 34, of the date of March 1, 1985 for completion of discovery and filing amendments, of April 15 for dispositive motions, and of April 26 for a final pretrial conference.

(Filed October 22, 1984)

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Case No. 82-4291

DOROTHY WILLNER,
Plaintiff,

vs.

UNIVERSITY OF KANSAS, et al.,
Defendants.

PETITION FOR RECONSIDERATION OF THE ORDER OF OCTOBER 15, 1984 DISMISSING PLAINTIFF'S CLAIMS AGAINST THE INDIVIDUAL DEFENDANTS

Petitioner, Dorothy Willner, appearing in her own behalf, states:

1. From the state of the record, it clearly appears that the Court was mistaken when it entered its order of October 15, 1984. That order constituted a final judgment against plaintiff and in favor of the dismissed defendants. It was highly prejudicial to plaintiff's interests. The Court stated: "However, even if the Court were disposed to grant plaintiff's motion for an extension of time, it is apparent that she has not filed the supplemental answers to the interrogatories within twenty days of the

Court's order." This was a factually erroneous material misstatement.

2. In point of fact, within twenty days of the Court's order of September 19, 1984, that is to say, on or before October 9, 1984, plaintiff had filed not only detailed and complete supplemental answers to defendants' interrogatories 3, 5, 9, 10, and 11 specified by the Court, but plaintiff had also filed Certificates of Compliance with the Court Order and had served copies of the answers and the Certificates on defendants' attorneys.

3. Attached to this petition are photocopies of such Certificates of Compliance with the Court Order, which bear the stamps affixed to plaintiff's office copies by the Clerk of this Court, at the time and on the date when plaintiff filed the original Certificates in the Clerk's office.

4. Consequently, not only did the defendants receive copies of the detailed and complete supplemental answers, but the Court itself had presumptive and detailed knowledge of their filing and contents.

5. Inasmuch as the Court's order is based upon a material error of fact, as to which the Court was misinformed, the order should be vacated. It is deeply prejudicial to plaintiff.

6. Alternatively, if the Judge had personal knowledge of the filings well within the twenty-day period referred to and consciously made a misstatement of fact, then the order would constitute a grave abuse of judicial discretion and should be vacated.

7. A denial of plaintiff's motion filed September 24, 1984 for extension of time to October 9, 1984 to answer

the supplemental interrogatories would also constitute an abuse of judicial discretion. Although church and state are rigorously separated under the First Amendment, American courts recognize the legitimate freedom of Americans to engage in religious observances which do not violate laws. As stated in the motion and as encompassed by judicial notice, the period between September 26 and October 6, 1984 (between the religious festivals of the Jewish New Year's Day and the Day of Atonement) constitute a singularly holy time for prayer and repentence during which petitioner was required to abstain from work entirely during the two days of the New Year and the day of the Day of Atonement and engage in prayer. It would be an abuse of judicial discretion to require plaintiff to engage during that time in the extensive work of completing the answers to the interrogatories. No material injury would accrue to the Court or the defendants by granting the motion. No willful failure to cooperate occurred, as the Court mistakenly characterized plaintiff's religious observance. It would be and was an error and abuse of judicial discretion to deny the motion. Moreover, plaintiff exhibited complete good faith in completing the answers and filing the certificates by October 9, 1984, within the extended time as requested.

WHEREFORE plaintiff prays that the Court reconsider and vacate the order of October 15, 1984.

/s/ Dorothy Willner
Dorothy Willner

STATE OF KANSAS)
)
COUNTY OF DOUGLAS)

Dorothy Willner on oath says that she signed the foregoing petition and that it is true.

/s/ Dorothy Willner
Dorothy Willner

(Seal)

Subscribed and sworn to before me this 22nd day of October, 1984.

/s/ Denise L. Rutledge
Notary Public

My commission expires: October 12, 1988.

Dorothy Willner, plaintiff, pro se
2112 Terrace Road
Lawrence, Kansas 66044
(913) 843-4442

(Filed October 3, 1984)

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Case No. 842-4291

DOROTHY WILLNER,
Plaintiff,

v.

UNIVERSITY OF KANSAS et al.,
Defendants.

CERTIFICATE OF COMPLIANCE WITH COURT ORDER

COMES NOW plaintiff pro se Dorothy Willner and, pursuant to Local Rule 17, respectfully informs the Court that she has made every effort possible, within the limitations imposed by her back spasms and migraine headaches and her observance of the Jewish High Holy Days, to comply with its Order of September 19, 1984. She completed this day, October 2, 1984, and served on defendants through their attorneys detailed and complete supplemental answers to defendants' interrogatories nos. 3 and 5. Said answers included 12 pages of text and reference with specificity to more than 70 deposition exhibits and other documents. Plaintiff pro se will continue

her efforts to complete supplemental answers to other interrogatories as soon as possible.

/s/ Dorothy Willner
Dorothy Willner
Plaintiff pro se
2112 Terrace Road
Lawrence, Kansas 66044
(913) 843-4442

(Filed October 9, 1984)

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Case No. 842-4291

DOROTHY WILLNER,
Plaintiff,

v.

UNIVERSITY OF KANSAS, et al.,
Defendants.

CERTIFICATE OF COMPLIANCE WITH COURT ORDER

COMES NOW plaintiff pro se Dorothy Willner and, pursuant to Local Rule 17, respectfully informs the Court that she completed this day, October 5, 1984, and served on defendants through their attorneys detailed and complete supplemental answer to defendants' interrogatory no. 9. Said supplement included seven pages of text and reference with specificity to 19 pages of plaintiff's deposition testimony and to more than 70 deposition exhibits and other documents. After Yom Kippur, plaintiff pro se will continue her efforts to complete supplemental answers to the remaining interrogatories as soon as possible.

/s/ Dorothy Willner
Dorothy Willner, pro se
2112 Terrace Road
Lawrence, Kansas 66044
(913) 843-4442

(Filed October 9, 1984)

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Case No. 842-4291

DOROTHY WILLNER,
Plaintiff,

v.

UNIVERSITY OF KANSAS, et al.,
Defendants.

CERTIFICATE OF COMPLIANCE WITH COURT ORDER

COMES NOW plaintiff pro se Dorothy Willner and, pursuant to Local Rule 17, respectfully informs the Court that she completed this day, October 7, 1984, and served on defendants through their attorneys detailed and complete supplemental answers to defendants' interrogatories no. 10 and no. 11.

/s/ Dorothy Willner
Dorothy Willner, pro se
2112 Terrace Road
Lawrence, Ks. 66044
(913) 843-4442

CERTIFICATE OF MAILING

I hereby certify that I served this certificate of compliance on the 7th day of October of 1984 by placing a copy of same in the United States Mail, postage prepaid, addressed to the following parties:

Clifford T. Mueller, RUSHFELT, MUELLER, DRUTAN & MORAN, 225 Oak Park Natl. Bank Bldg., 11111 W. 95 St., Overland Park, Ks. 66214;

Rose Marino, General Counsel's Office, 227 Strong Hall University of Kansas, Lawrence, Ks. 66045;

J. Steven Pigg, FISHER, PATTERSON, SAYLER & SMITH, 400 First Natl. Bank Tower, Topeka, Ks. 66603.

/s/ Dorothy Willner
Dorothy Willner

(Filed November 7, 1984)

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Case No. 82-4291

DOROTHY WILLNER,
Plaintiff,
v.
UNIVERSITY OF KANSAS, et al.
Defendants.

PLAINTIFF'S REPLY TO DEFENDANTS' RESPONSE TO PLAINTIFF'S PETITION FOR RECONSIDERATION OF ORDER DISMISSING INDIVIDUAL DEFENDANTS

COMES NOW plaintiff pro se Dorothy Willner and replies as follows to defendant University's opposition to plaintiff's petition for reconsideration of the order of October 15, 1984, dismissing plaintiff's claims against individual defendants:

1. It is untrue that plaintiff's religious obligations required her to abstain from work entirely for only two days of the Jewish New Year plus the Day of Atonement. On the contrary, plaintiff's religious obligations also required her to abstain from all work during the Sabbath between the two days of the Jewish New Year and the

Day of Atonement. In addition, plaintiff was required to abstain from all work and engage in fasting and prayer on the Day of Atonement. Thus, during the special period between September 26, 1984, when the Jewish New Year began, and October 7, when the period of prayer and repentence ended, plaintiff's religious obligations required her to abstain from all work and engage in prayer for four complete days from one sundown to the following night.

2. The Postal Service did not deliver to plaintiff the copy of the court's order filed September 19, 1984 until the passage of the period allowed for mailing. Plaintiff served on defendants complete and detailed supplementary answers to two interrogatories on October 2, exactly ten days plus mailing time after the court's order of September 19 was filed, and so notified the court. Plaintiff then served on defendants an additional complete and detailed answer to a third interrogatory on Friday, October 5, 1984, and so notified the court. The three additional days between October 2 and October 5 were made necessary by the three days of abstention from all work and dedication to prayer comprising the two days of the Jewish New Year plus the Sabbath which fell between September 26, 1984 and October 2, 1984. The Day of Atonement fell on October 6, 1984 which was also Sabbath. On this day plaintiff again abstained from all work and engaged in prayer. On October 7, 1984, plaintiff completed and served on defendants complete and detailed supplementary answers to all remaining interrogatories and so notified the court.

3. Plaintiff acted in complete good faith at all times. She filed supplementary interrogatories in full within

ten days after she received the court's order filed September 19, 1984 plus the four holy days during which she observed religious injunctions of the most sacred days of the year according to her religion.

4. If defendant University and individual defendants would persist in denying to plaintiff her Constitutional right to religious observance including prayer and abstention from work during these four sacred days of the Jewish religion, they thereby necessarily give further evidence of their discrimination against plaintiff on the basis of religion.

5. Individual defendants have filed a memorandum in opposition to plaintiff's motion for reconsideration. This memorandum begins with a chronology which, by selection and omission, is misleading.

6. Plaintiff pro se herewith presents the chronology of events which made it legally or physically impossible for her to supplement answers to defendants' interrogatories for six months after the court's order filed March 5, 1984 that she do so. Plaintiff begins by correcting a misstatement of fact in defendants' chronology.

Description	Date
Complaint filed by attorney Fred W. Phelps, Jr., counsel for plaintiff.	December 1, 1982 (not November, 1982 as alleged by defendants).
The court gives plaintiff pro se until July 1, 1983 to answer defendants' interrogatories (Doc. 61).	6/16/83

Description	Date
Plaintiff complies with court order by completing answers to defendants' interrogatories and serving them on defendants through their attorneys.	7/1/83
Plaintiff pro se files a motion requesting a stay of discovery for ninety (90) days while she pursues her search for counsel (Doc. 62).	7/29/83
The court grants plaintiff a stay of discovery until September 23, 1983 (Doc. 69).	8/16/83
The court rules on a set of motions filed during preceding months by both plaintiff pro se and defendants. The court's orders to both plaintiff and defendants include an order and memorandum to plaintiff to supplement interrogatories.	3/5/84 3/6/84
Plaintiff becomes legally precluded from supplementing her answers to defendants' interrogatories except through counsel, since plaintiff employs Gwen G. Caranchini of Moore and Willy as her attorney and gives attorney Caranchini and Moore and Willy a retainer of $1000.00.	3/9/84
Plaintiff becomes physically unable to work on supplementary answers to defendants' interrogatories because she complies with attorney Caranchini's instructions to bring counsel all materials in her case including duplicates.	3/13/84 to 3/21/84

Description	Date
Plaintiff remains both legally and physically unable to work on or file supplementary answers to defendants' interrogatories, since attorney Caranchini has transferred plaintiff's documents to the law firm of Sherman, Wickens, Lysaught and Speck.	4/04/84
Plaintiff becomes unable to press counsel to work with her on supplementary answers to defendants' interrogatories, since attorney Caranchini, still plaintiff's counsel, goes out of all face-to-face or telephone communication with plaintiff. Plaintiff's documents remain with Sherman, Wickens.	4/13/84
Attorney Caranchini, still plaintiff's counsel, advises plaintiff by letter that she would consider it an act of dismissal for plaintiff to retrieve her documents from the law offices of Sherman, Wickens, although they have declined to take her case. Plaintiff remains both legally and physically incapable of supplementing her answers to interrogatories.	4/29/84
Plaintiff learns that attorney Wickens will move plaintiff's documents to John Mueller III of the law firm of Linde Thomson Fairchild Langworthy Kohn & Van Dyke. Plaintiff writes to attorney Mueller asking when she can review her documents and retrieve her duplicates.	5/5/84

Description	Date
Having given attorney Mueller due notice (see plaintiff's letter to him of May 9, a copy of which is appended hereto as Exhibit A), plaintiff seeks access to her documents. She is detained at the entrance to the law offices of Linde Thomson and is given a receipt showing that Ms. Caranchini had picked up plaintiff's documents from said law firm earlier that day (See copy of receipt appended hereto as Exhibit B). Plaintiff remains both legally and physically incapable of supplementing her answers to interrogatories.	5/11/84
Attorney Caranchini files a Notice of Withdrawal with the court.	5/21/84
Having received counsel's Notice of Withdrawal filed May 21, 1984, plaintiff and her sister collect plaintiff's documents from the law offices of Moore and Willy and Ms. Caranchini. Plaintiff still remains legally precluded from supplementing her answers to defendants' interrogatories.	5/25/84
Still in search of reliable counsel to take her case, plaintiff has already attempted to reach John Goffstein of Bartley, Goffstein, Bollato and Lange in St. Louis.	5/25/84
Attorney Goffstein (1) agrees to consider representation of plaintiff and her sister, (2) instructs plaintiff to bring all her materials with her to St. Louis, (3) notifies the court of his intentions, (4) enters into	5/29/84 to 6/4/84

Description	Date
communication with defendant attorneys, and (5) instructs plaintiff to leave her materials with him, return home and wait. Plaintiff is once again both physically incapable of supplementing her answers to interrogatories and legally precluded from doing so.	
Plaintiff is informed by the court that she is once again pro se. Plaintiff so notifies attorney Goffstein by telephone. He instructs plaintiff to wait a few more days until seeking to retrieve her documents, since he is trying to find counsel for plaintiff and her sister. Plaintiff remains physically incapable of supplementing her answers to interrogatories.	6/21/84
Attorney Goffstein notifies plaintiff that he has turned her documents over to Lisa Van Amburg of Schuchat, Cook and Werner (see copy of his letter appended hereto as Exhibit C). Plaintiff remains physically incapable of supplementing her answers to interrogatories.	6/29/84
Plaintiff retrieves her documents from Lisa Van Amburg, having finally been granted an appointment with her on July 10 and July 11, 1984.	7/11/84
Plaintiff is back in Lawrence with her documents. This is the first day since March 9, 1984, more than four months earlier, that she can begin to think of supplementing in-	7/13/84

Description	Date
terrogatories. However, she faces deposition duces tecum the following week and her documents are in disorder.	
Plaintiff advises the court at a scheduling conference that her documents are in disorder. The court does not grant her time to organize them before her deposition begins the following day.	7/17/84
Plaintiff is deposed starting that day by three defendant attorneys, she pro se. After three days of it, she seeks a protective order. Plaintiff herein incorporates by reference her motion for a protective order, accompanied by physician's certificate, filed July 23, 1984 (Doc. 116).	7/18/84
Plaintiff's deposition continues on order of Judge Rogers. Plaintiff is thereby physically prevented from *de jure* supplementation of answers to defendants' interrogatories, even while she is *de facto* providing said answers both orally and in documents made available for defendant attorneys' inspection as well as those made deposition exhibits.	7/25/84
Defendants file Motion to Dismiss on grounds that plaintiff has not supplemented interrogatories even while she is providing the answers they seek.	8/10/84

7. In her response to defendants' motion to dismiss filed August 20, 1984, and in her amendment and supple-

ment to her response to defendants' motion to dismiss, filed August 21, 1984, plaintiff pro se informed the court that she could not have complied with the court's order to supplement interrogatories from the time it was filed on March 5, 1984, except through counsel, until after June 21, 1984, when the court granted counsel leave to withdraw. Plaintiff also reiterated the fact that her documents were not accessible to her but were in the hands of counsel in St. Louis from June 1, 1984 until July 11, 1984. Plaintiff also reiterated the self-evident fact that she could not have complied with the court's order while she was being deposed, from July 18, 1984 until August 16, 1984 when she had already provided all the answers sought by defendants in their demand to her to supplement her answers to their interrogatories. Plaintiff herein reincorporates by reference said responses and the exhibits attached thereto (Docs. 121 and 122). The record shows that plaintiff was prevented legally, physically or both from supplementing her answers to defendants' interrogatories for more than five months.

8. Plaintiff repeats and reiterates that she has exhibited complete good faith in trying to meet court orders. She filed supplemental answers in full to defendants' interrogatories within ten days after she received the court's order filed September 19, 1984 plus four holy days during which she observed the religious injunctions or the most sacred days of her religion.

9. It was and would be an abuse of judicial discretion to deny plaintiff the right to prayer, repentence and abstention from all work on the two days of the Jewish New Year, on the Sabbath between the New Year and the Day of Atonement, and on the Day of Atonement.

(Filed June 16, 1988)

IN THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 86-2678

DOROTHY WILLNER,
Plaintiff-Appellant,

vs.

UNIVERSITY OF KANSAS, ARCHIE R. DYKES, DELBERT M. SHANKEL, FRANCES D. HOROWITZ, ROBERT P. COBB, ROBERT S. HOFFMAN, ROBERT J. SQUIER, ANTA MONTET WHITE, FELIX MOOS, JOHN M. JANZEN, MICHAEL CRAWFORD, DAVID FRAYER, DONALD STULL,
Defendants-Appellees.

PETITION FOR REHEARING

Pursuant to the provisions of Rule 40 of the Federal Rules of Appellate Procedure, Dorothy Willner, the above-named appellant, respectfully petitions the Court to grant a rehearing and reconsideration of the appeal in the above-entitled cause. In support of this petition, appellant represents to the Court as follows:

1. In holding that the district court did not abuse its discretion in dismissing plaintiff's action against the individual defendants (Opinion, pages 12-14), this Court

is in direct conflict with the decisions of the United States Supreme Court in *Societe Internationale v. Rogers*, 357 US 197, 212 (1958) and in *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 US 639, 640 and 642 (1975). *Societe Internationale* held that Rule 37

> "should not be construed to authorize dismissal of (a) pretrial production order when it has been established that failure to comply has been due to inability, and not to willfulness, bad faith, or any fault of petitioner."

National Hockey League reiterated said standard and also reiterated at 641-642 that the District Court was required to consider the full record in determining whether to dismiss for failure to comply with discovery orders, citing to *Link v. Wabash R. Co.*, 370 US 626, 633-634 (1962).

2. This Court and the District Court have disregarded the full record and have overlooked and ignored the clear evidence therein of facts which make it clear that plaintiff's actions did *not* demonstrate willful disregard of the district court's orders and did *not* constitute a willful failure to cooperate in the discovery process. This Court has also ignored and disregarded the evidence in the full record that plaintiff repeatedly explained to the district court, starting more than three months before August 10, 1984, why she was unable after March 13, 1984 to supplement her answers to defendants' interrogatories in compliance with the District Court's order of March 5, 1984, until she provided the information answering defendants' interrogatories in deposition during July and August of 1984.

3. As the full record clearly demonstrates, plaintiff acted in good faith in seeking counsel who would help

her meet the District Court's order of March 5, 1984. As the full record clearly demonstrates, plaintiff further acted in good faith in seeking access to her evidence files in order to meet said order after her evidence files ceased being in her possession in consequence of her efforts to find counsel to help her. As the full record also clearly demonstrates, the District Court not only was fully apprised of plaintiff's good faith efforts to comply with said District Court order with the help of counsel but also was in communication with the counsel who held plaintiff's evidence files precluding her access to them until barely a week before defendants' deposition of her began.

4. This Court also has disregarded and ignored the full record wherein it clearly demonstrates that plaintiff completed supplementing defendants' interrogatories within 20 days after the District Court's order of September 19, 1984 and that she earlier had repeatedly informed the District Court of limitations on her strength and energies because of stress-induced back spasms and migraine headaches. Therefore, this Court has grievously erred and overlooked the facts in alleging, on page 9, that ". . . Dorothy Willner had ample time to comply with the court's order prior to her religious observance." On the contrary, as the full record demonstrates, plaintiff worked to the limits of her strength, day by day, supplementing defendants' interrogatories between the time she received Judge Rogers' order of September 19, 1984 by U.S. mail and the onset of Rosh HaShana on September 26, 1984, in order to have been able to complete supplementing defendants' interrogatories Nos. 3 and 5 after the two days of Rosh HaShana and the Sabbath between Rosh HaShana and Yom Kippur and then

supplement defendants' interrogatory No. 9 before the onset of Yom Kippur. Plaintiff met the District Court's order of September 19, 1984 within 20 days, having timely moved for a 10 day extension for the purposes of religious observance of the most sacred Jewish High Holy Days of Rosh HaShana, Yom Kippur and the Sabbath between them according to the tenets of her faith.

5. In the light of the above, this Court has made grievous errors of fact and law in upholding the District Court's abuse of discretion in (i) violating the letter as well as the spirit of the 1983 Amendment to F. R. Civ. P. 26; and then in (ii) violating plaintiff's First Amendment right to religious observance according to the standard set by the U.S. Supreme Court in *Sherbert v. Verner*, 374 US 398 (1963) and in *Wisconsin v. Yoder*, 406 US 205 (1972). According to *Sherbert*, "only the gravest abuses, endngering paramount interests, give occasion for permissible limitation of religious freedom." According to *Yoder*, "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." Alleged unfairness to law clerks in searching through a deposition transcript clearly does not constitute an interest of the highest order or one not otherwise served. Furthermore, the Court misconstrues the record in alleging, contrary to the evidence, that counsel for defendants and the district court were concerned about law clerks reviewing the transcript of defendants' unprotected deposition of plaintiff for twelve days in callous disregard of plaintiff's health and her doctor's recommendation. As the transcript of the hearing held before Judge Rogers on September 18, 1984 clearly shows, counsel for defendants specifically stated that it would be unfair to *the*

defendants to ask them to go through said transcript. Under these circumstances, the district court clearly abused its discretion in violating the letter as well as the spirit of the 1983 Amendment to F.R.Civ.P. 26. This Court has made grievous errors of fact and law, contrary to the mandate of Congress and of the Supreme Court, to unhold the District Court's clear abuses of discretion and violation of Plaintiff's First Amendment right to religious observance in dismissing individual defendants and plaintiff's claims against them. This Court has overlooked and misconstrued the record, including the caption of this action in its order of December 9, 1987, in disregarding and ignoring the clear fact that plaintiff's appeal in this action is from the District Court's dismissal of individual defendants and their claims in its order of October 15, 1984 as well as from its opinion and judgment entered on September 16, 1986.

6. This Court has overlooked, ignored and misconstrued clear facts of record in the entire evidence of this case in its review of the findings of the trial court. This Court has overlooked, ignored and misconstrued, *inter alia*, the testimony of defendant University of Kansas' own witness, Anta Montet White, and plaintiff's trial exhibits admitted during said testimony including trial exhibits Nos. 43, 45, 47, 53, 75, 76, 80, 81, 88, 89, 91-98, 101, 114, 115, 119, 119A, 135C, 135D, 135E, 136B, 136C, 136D, 137C, 137D, 137E, 138B, 138C, 138D, 139D, 139E, 139F, 140C, 140D, 140E, 141C, 141D, 141E, 142C, 142D, 153A, 154, 154A, 155, 156, 157, 158, 158A, 160 which this Court admitted as part of the record on appeal. This Court has overlooked, ignored and misconstrued said testimony and trial exhibits which clearly establish that defendant University of Kansas *failed to meet its burden*

of proof that the wage differential between plaintiff's salary and the salaries of other male professors resulted from the existence of a valid merit system. When the issue of salary differentials is brought under both Title VII and the Equal Pay Act, the legal standards established under the Equal Pay Act control. Since the District Court found that plaintiff established a prima facie case of salary discrimination based on sex, the burden of proof shifted to defendant University of Kansas. The District Court ignored, overlooked and misconstrued testimony which clearly evidenced Defendant's failure to meet its burden of proof as to the existence of a valid merit system.

7. The District Court, citing to *Equal Employment Opportunity Commission v. Aetna Insurance Co.*, 616 F.2d 719, 724 (4th Cir. 1980), concluded that, by law, a merit system must be an organized and structured procedure whereby employees are evaluated systematically according to predetermined criteria. However, the testimony at trial of defendant's witness White shows a procedure whereby employees were not evaluated systematically according to predetermined criteria systematically applied to each of them in the actual evaluation. For example, on May 12, 1986, Professor White testified that only 60 per cent of individual salary increases involved considerations of individual performance, i.e., alleged merit (trans., 5/12/86, Vol. II, p. 713). She further testified testified to the fact that point designations for salary awards could vary and did vary within the identical stated verbal merit ratings (trans., Vol. II, pages 729-730) and that fewer points were given Plaintiff as compared to other faculty with the same rating (trans. 5/12/86, pp. 731-736). She admitted that special consideration was given on a personal and individual basis to rewarding long service

(trans. 5/13/86, Vol. III, pp. 83-84). Plaintiff's above cited trial exhibits admitted during said testimony, from No. 135C through No. 142D, constitute unequivocal and unambiguous evidence of idiosyncratic, variable and non-systematic factors in salary evaluations of faculty in the Anthropology Department of defendant University.

8. This Court additionally has overlooked and ignored the evidence which plaintiff presented during oral argument on December 15, 1987, that, on December 9, 1987, Bruce Miller testified under oath that, in his capacity as Deputy Attorney General of the State of Kansas, he had advised Dean Robert L. Lineberry in his capacity as Dean of the College of Liberal Arts and Sciences of defendant University that, as of October 1981, there was no merit system in operation at the University of Kansas.

9. This Court has also overlooked, ignored and disregarded the testimony at trial of expert witness Manning Nash, who had been proposed as an expert witness by defendant as well as plaintiff, as well as the testimony of plaintiff's witnesses Robert S. Merrill, William McVey, Ruth Rotsman, Nancy Sempolski, James Taylor, Ann R. Willner and plaintiff herself as pertaining to (i) defendant University's burden of proof of the existence of a valid merit system; and (ii) the issues of retaliation against plaintiff because she complained to the administration of defendant University in 1972 of discrimination on the basis of sex in salary determinations in the Department of Anthropology (Brief, Ex. 5, Ex. 7); because she further complained in May 1987 of a violation by said Department and by defendant University of its affirmative action procedures and of the Agreement between the University of Kansas and the Kansas Commission on Civil Rights signed in 1976 (Brief, Ex. 9, 10); because she filed

charges with the E.E.O.C. in 1981 of discrimination in salary on the basis of sex and of retaliation and harassment for protected activities, charges for which the E.E.O.C. found probable cause after due investigation by a lawyer on its staff (Brief, Ex. 2, attached to her Complaint in this case); and because she filed and prosecuted this case in District Court.

10. This Court has also overlooked, ignored and misconstrued the entire evidence in its groundless assertion (pp. 17-18) that the district court found that defendant University's witness John Schott testified that plaintiff

> failed to submit the materials needed for proper evaluation, or submitted them late and to the wrong person, and that during several years she received no increase because of her failure to cooperate.

On the contrary, as the facts of the record clearly show, Mr. Schott's testimony (trans. 5/29/86, Vol. VI, pp. 1026-1031) was purely procedural and solely concerned his competence, as an employee of defendant University, to get into evidence defendant's purely statistical exhibits D-5, E-5, F-5, G-5. Furthermore, the District Court's findings did *not* include any finding concerning Mr. Schott's testimony beyond citing to the statistics (figures, computations, comparisons) presented in defendant's exhibits E-5, F-5, G-5.

11. In the light of paragraphs 6 through 10 *supra*, this Court has clearly disregarded and ignored the standard mandated by the Supreme Court in *Anderson v. City of Bessemer City*, 470 US 564, 574 (1985) and in *United States v. United States Gypsum Co.*, 333 US 364, 395 (1948) to review the District Court's account of the evidence and its findings in the light of the evidence of the

record viewed in its entirety. Furthermore, the evidence viewed in its entirety clearly includes, as mandated in 10th Cir. R. 11.1.3., all documents filed in the district court except those items excluded by 10th Cir. R. 10.2.4. The documents filed in District Court include clear evidence of material misrepresentations under oath in discovery and other matters by Robert J. Squier as well as other individual defendants in this action. Said evidence clearly is relevant and material to the issue of Professor Squier's credibility as a witness at trial where his testimony was in clear conflict with the testimony of other witnesses, including Ann R. Willner and plaintiff.

RECUSAL ISSUES

12. The Supreme Court held in *Marshall v. Jerrico, Inc.*, 100 S.Ct. 1610 at 1613:

> The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases. This requirement of neutrality in adjucative proceedings safeguards the two central concerns of procedural due process, the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decisionmaking process. See *Carey v. Piphus*, 435 U.S. 247, 259-262, 266-267, 98 S.Ct. 1042, 1043, 1050-52, 1053, 55 L.Ed.2d 252 (1978). The neutrality requirement helps to guarantee that life, liberty or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law. See *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 907, 47 L.Ed.2d 18 (1976). At the same time, it preserves both the appearance and reality of fairness, "generating the feeling, so important to a popular

> government, that justice has been done." *Joint Anti-Facist Committee v. McGrath,* 341 U.S. 123, 172, 71 S.Ct. 624, 649, 95 L.Ed. 817 (1951) (Frankfurter, J. concurring), by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him.

In *Margoles v. Johns,* 660 F.2d 291, 296 (7th Cir. 1981), *cert. den.* 455 US 909, the Court held:

> A litigant is denied the fundamental fairness to which he is constitutionally entitled if the judge of his case is unfairly biased against him. However, a litigant is not denied due process by either the "appearance" of partiality or by circumstances which might lead one to speculate as to a judge's impartiality. A litigant is denied due process if he is *in fact* treated unfairly. (emphasis in original)

13. This Court has made a grievous error which, *inter alia,* upholds the District Court in its unjustified attempt to deprive plaintiff of her integrity, good name and, possibly, her employment as well, by overlooking and disregarding the record in its entirety. The entire record of this case establishes incontrovertibly that plaintiff was *in fact* treated unfairly.

14. This Court has disregarded and misconstrued the record in stating (page 3):

> Willner's attorney was granted leave to withdraw shortly after the complaint was filed. Willner appeared pro se throughout the course of the lawsuit.

In point of fact, however, the entire record of this case, including the docket, makes it evident that this statement

is clearly erroneous as well as prejudicial to plaintiff. It is clearly erroneous, since the entire record including the docket unequivocally establishes (i) that the law firm of Phelps Chartered of Topeka, Kansas, represented plaintiff when this case was filed on December 1, 1982; (ii) that it moved to withdraw on June 2, 1983 (Doc. 59); (iii) that the District Court granted it leave to withdraw on June 16, 1983 (Doc. 61); (iv) that the law firm of Moore and Willy and Gwen Caranchini of Kansas City, Mo. and the law firm of Works & Works of Topeka, Ks. made an entry of appearance as plaintiff's counsel on March 20, 1984 (Doc. 105); (v) that they moved to withdraw (defaming plaintiff) on May 21, 1984 (Doc. 108); (vi) that the District Court entered an order allowing them to withdraw on June 21, 1984 (Doc. 111).

14. This Court's statement quoted in paragraph 14 *supra* is prejudicial in that it fails to take cognizance of the clear facts of record that (i) counsels' notice of withdrawal of March 20, 1984, was in violation of the governing Local Rule 4(e); (ii) said counsel was well as other counsel to whom Ms. Caranchini referred plaintiff and to whom she forwarded plaintiff's evidence files (*See* paragraphs 2 and 3 *supra*) were in gross conflict of interest with plaintiff, since they had represented Northeastern Fire Insurance Co. of Pennsylvania which insured individual defendants in this case through the University of Kansas Teachers and Employees Association; (iii) the District Court's order allowing said counsel to withdraw was clearly erroneous pursuant to Local Rule 4(e). This Court has also overlooked and ignored the pleadings in the entire record of this case wherein plaintiff repeatedly brought said facts concerning counsel and issues pertinent to their withdrawal to the notice of the District Court

and prayed for relief, i.e., her Petition for Disciplinary Proceeding, filed December 11, 1984 (Doc. 185), which was never answered by the District Court; her Motion for Continuance filed January 14, 1986 (Doc. 256); her Motion for Stay of Trial filed May 6, 1986 (Doc. 304); Motion to Amend Pursuant to F.R.Civ.P. 52(b) filed September 26, 1986 (Doc. 328); Motion for Stay Pending Appeal, filed July 15, 1987 (Doc. 354). This Court has also overlooked the District Court's failure to grant plaintiff necessary relief prior to trial, such as remedying the Court's erroneous order granting withdrawal and replacing it with a non-reversible final order, crossing counsel Caranchini's name, address and other counsel's addresses from the docket, to enable her to secure counsel to represent her who could zealously prosecute her action wholly and irrevocably independent of representation of plaintiff by her earlier attorneys. Absent such relief, plaintiff, who was 58 years old at time of trial, who suffered (and continues to suffer) hours of pain daily from stress-induced back spasms and headaches, who began suffering from stress-induced angina-like pain in March 1986 (and continues intermittently to experience it), was forced to trial pro se on May 6, 1986 even while she still was occupied with her responsibilities during Spring Semester 1986 to defendant University and her students enrolled therein. The District Court rendered plaintiff pro se by its deliberately erroneous order of June 21, 1984 (Doc. 111) and forced her to remain pro se, since it precluded the possibility of her finding appropriate counsel to represent her at trial. As the Court of Appeals for the Fifth Circuit stated in Caston v. Sears, Roebuck & Co., Hattiesburg, Miss., 556 F.2d 1305 (5th Cir. (1977) at 1308:

> . . . a layman unschooled in the law in an area as complicated as the civil rights field . . . likely has

little hope of successfully prosecuting his case to a final resolution on the merits.

Accord, Bradshaw v. Zoological Soc. of San Diego, 622 F.2d 1301 (9th Cir. 1981) at 1310-11.

15. This Court has also overlooked and disregarded the evidence in the entire record, including but not limited to oral argument, of *ex parte* communication between the District Court and the Office of the Attorney General of the State of Kansas, which is obligated by statute to defend the University of Kansas and did so in this action by and through Rose Marino, who is a Special Assistant Attorney General. Said *ex parte* communication included a letter which the Attorney General, Robert T. Stephan, sent Magistrate Van Bebber in 1983 and a meeting which Bruce Miller, Deputy Attorney General of the State of Kansas, held with Judge Rogers on March 10, 1986, both of these directly pertaining to plaintiff and relevant and material to her action. Since the District Court repeatedly refused to recuse itself pursuant to 28 U.S.C. 455(b)(1), which mandates disqualification when a judge or magistrate has personal knowledge of disputed evidentiary facts concerning the proceeding, said refusal clearly is relevant and material to the Due Process Clause as it pertains to this case.

16. This Court has also overlooked and disregarded the evidence in the trial transcript that plaintiff was in fact treated unfairly. For example, Judge Rogers interrupted plaintiff's opening statement to ask whether she had said she retired whereupon plaintiff answered that she had not (trans., Vol. I, pp. 36-37). Then Judge Rogers denied ever having asked plaintiff whether she had retired (trans., Vol. L, pp. 309-310). Judge Rogers

used "We" when discussing an exhibit of defendant (trans., Vol. II, pp. 786-787). After plaintiff referred to grief at the death of her father, Judge Rogers stated:

> Please do not subject us to it. The hatred that is shown here is just almost impossible for the court to believe or understand (trans., Vol. II, p. 898).

Judge Rogers also assailed plaintiff as "almost paranoid" (trans., Vol. II, p. 899), castigated her for asking that a potential witness be sequestered (trans., Vol. V, pp. 436-439), insisted that the Dean of the College of Liberal Arts and Sciences does not set salaries in willful disregard of the evidence (trans., Vol. V, p. 473) and repeatedly impugned plaintiff's integrity, as when he stated:

> I see that when the questions are being answered the way you want them answered, you have no health problems. The minute you start getting answers you do not like you immediately find these health problems (trans., Vol. V, pp. 99, 100).

Judge Rogers refused to accept plaintiff's physician's diagnoses as to her physical condition absent an affidavit and plaintiff finally collapsed during trial. Judge Rogers also averred to plaintiff from the bench:

> I don't care what you do. It doesn't make any difference (trans., Vol. VI, p. 708).

Nonetheless, he refused to allow her to ask questions bearing on witnesses' credibility (e.g., trans. Vol. VI, p. 708). Furthermore, plaintiff was precluded from litigating fully and fairly most of the issues in the pre-trial order, particularly those pertaining to issues of retaliation, because they also pertained to vindication of her

constitutional rights to free speech, procedural due process and equal protection of the law and to vindication of her good name, reputation, honor and integrity. Said preclusion resulted from Judge Rogers having granted defendant's motions in limine concerning reference to statements or inferences (a) that plaintiff had any claim against defendant University other than under the Equal Pay Act and Title VII or pursuant to other civil rights statutes; (b) that she had any claim against dismissed individual defendants or against proposed defendants in an Amendment she had by right but which the District Court refused to grant on March 6, 1984 (Docs. 85, 91, 102); (c) that she had claims for slander.

17. This Court has also overlooked and ignored clear evidence in the record that Judge Rogers abused his discretion by substantially false characterizations of plaintiff and her conduct, e.g., on pages 24 and 29 of his Opinion of September 16, 1984, wherein he found that

> The suggestions of her colleagues at various times over the years to members of the administration that plaintiff be removed from the Department can only be viewed as constructive suggestions given the many problems caused by the plaintiff in the Department. (p. 24)
>
> The court hopes that this opinion will put to rest the unrest that has existed in the Department of Anthropology for the past fifteen years. We recognize, however, that there is little hope for such reconciliation until plaintiff is willing to accept the responsibility for the turmoil that has occurred in the Department.

Such characterizations were substantially false in the light of: (i) another case in Judge Rogers' Court which had been filed September 12, 1984 by two graduate students in the Department of Anthropology, *Murray and Sempolski vs. Crawford, Horowitz, McNall, Squier, Frayer, Montet-White, Argersinger, Stull, Nicklas, Janzen, Moos,* Case No. 84-4302; (ii) clear evidence in the record of said case of issues of turmoil in the Anthropology Department wholly removed from the plaintiff herein such as issues of grant fraud, student kick backs and violation of federal regulations as to human experimentation, such as the fact of an earlier case filed by Professor Crawford in State Court against Professor Lundsgaarde, Murray, Sempolski and others, such as the fact of testimony in said case concerning National Institutes of Health sanctions imposed on Professor Crawford, etc.; (iii) clear evidence in the record of plaintiff's case in District Court that the problems she allegedly caused pertained to her efforts to vindicate First, Fifth and Fourteenth Amendment rights and her own good name, reputation, honor and integrity.

18. Judge Rogers' substantially false characterizations of plaintiff and her conduct not only have stigmatized her but also laid the ground for an alteration of her legal status as a tenured, full-time professor in the Department of Anthropology and in the University of Kansas on the grounds that she is a disruptive element. As the entire record shows, the District Court's stigmatization of plaintiff was made public in stories published, *inter alia*, in the *Topeka Capital Journal* wherein, for example, a story published on September 17, 1986, concluded with a paragraph stating:

> Rogers said requests by faculty members that Willner be fired from KU "can only be viewed as constructive suggestions given the many problems caused" by Willner.

The entire record also shows that the University of Kansas has been attempting to force plaintiff to retire early or accept an alteration in her legal status as a tenured, full-time professor up to and including the 1987-88 academic year on false and pretextual grounds and absent contractually mandated provisions for procedural due process. The entire record establishes incontrovertibly that plaintiff was in fact treated unfairly.

19. In the light of the above, this Court has made a grievous error in overlooking, ignoring and misconstruing the entire record of plaintiff's factual allegations and of pertinent facts relevant and material to the issues of Judge Rogers' abuse of discretion in refusing to recuse himself from presiding over her case in District Court and in his violation of her First Amendment right to the exercise of her religion and her Due Process right while presiding. The record of adverse rulings includes all the pertinent facts set forth with specificity in paragraphs 1 through 5 *supra* and in paragraph 14 *supra*. The pertinent facts set forth in paragraphs 1 through 5 show blatant and flagrant abuse of discretion in the totally unwarranted burden which Judge Rogers placed on plaintiff's exercise of her religion. *See Sherbert v. Verner, supra*. Furthermore, under 28 U.S.C. § 144, the judge may not consider the truth of the facts alleged, much less engage in inference. The court must take as true the facts set out in the affidavit. *Bell v. Chandler*, 569 F.2d 556 (10th Cir. 1978). If Judge Rogers was not

anti-Semitic in his callous disregard of the singularly sacred nature for Jews of the Jewish High Holy Days of Rosh HaShana, Yom Kippur and the Sabbath between them, then he necessarily was personally biased against plaintiff in her exercise of her religion. Either alternative gives fair support to the charge of a bent of mind on the part of Judge Rogers toward plaintiff that may prevent or impede impartiality of judgment. *Berger v. United States,* 255 US 22 (1921).

20. 28 U.S.C. § 455(a) and 455(b)(1) do not require an affidavit. Under section 455, a judge is not limited to those facts presented by the challenging party. *Idaho v. Freeman,* 507 F.Supp. 706, 721, 723 (D.Idaho 1981). Judge Rogers failed to act on plaintiff's motion to recuse of October 11, 1983, until August 30, 1984, by which time he incontrovertibly had personal knowledge of disputed evidentiary facts concerning plaintiff and her proceeding on the basis, at the least, of the *ex parte* letter from Robert T. Stephan, Attorney General of the State of Kansas. Despite continued *ex parte* communication with the Office of the Attorney General, at the least, Judge Rogers refused to recuse himself to the day of trial in clear violation of section 455(b)(1). He also continued to dissemble his many close personal ties to defendant University. Thus, plaintiff did not discover that he was a director of KU's Endowment Association (whereby he has a personal interest in the outcome of any litigation which can adversely affect the level of contributions to KU) until this was disclosed to her by Myra Hinman during the week after Judge Rogers entered judgment in plaintiff's case, to her best recollection.

21. This Court has misconstrued the record in erroneously asserting that plaintiff learned that Judge Rogers

was director of KU's Alumni Association from Myra Hinman and moved untimely to recuse on this basis for disqualification. As the record clearly shows, plaintiff learned of this basis from Ann R. Willner and thereupon filed her motion to recuse timely. Time of discovery of disqualifying facts, not date of filing a complaint, determines the timeliness requirement of a motion pursuant to section 455(a) in this Circuit. *United States v. Gigax*, 605 F.2d 507, 511 (10th Cir. 1979). However, the entire record makes it clear that under no circumstances would Judge Rogers recuse himself in plaintiff's case. He was too disposed against plaintiff to preserve either the appearance or the reality of fairness.

WHEREFORE, appellant prays that a rehearing be granted and that on rehearing granted this Court's opinion dated June 1, 1988, be withdrawn and that the Court enter a new opinion reversing the judgment of the District Court on all her issues. Dated this 15th day of June, 1988.

/s/ Dorothy Willner
Dorothy Willner
Plaintiff-Appellant Pro Se
2112 Terrace Road
Lawrence, Kansas 66044
(913) 843-4442

(Dated June 19, 1988)

IN THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 87-1249
No. 87-1869

DOROTHY WILLNER,
Plaintiff-Appellant,

vs.

GENE BUDIG, ET AL.
Defendants-Appellees.

PETITION FOR REHEARING

Pursuant to the provisions of Rule 40 of the Federal Rules of Appellate Procedure, Dorothy Willner, the above-named appellant, respectfully petitions the Court to grant a rehearing and reconsideration of the appeal in the above-entitled cause. In support of this petition, appellant represents to the Court as follows:

1. This Court has disregarded the entire record in alleging the plaintiff "claims that while acting as agents of the University . . . the defendants conspired to commit and did commit various acts of harassment and retaliation against her . . ." On the contrary, as the record clearly show, plaintiff's claims were specifically against defendants in their *individual* capacities only for acts they

conspired to commit and did commit under color of state law. As the language of 42 U.S.C. § 1983 indicates and as the Surpeme Court of the United States has expressly recognized "the initial inquiry must focus on . . . (1) whether the conduct complained of was committed by a person acting under color of state law; and (2) whether this conduct deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States." *Parratt v. Taylor*, 451 US 527, 535 (1981). The record makes it clear that plaintiff never sued individual defendants in their official capacities as agents of the University of Kansas since, as she stated in her principal Brief (p. 16), it is well settled in the State of Kansas that state university employees who are sued in their official capacities are protected by the Eleventh Amendment. *Beck v. Kansas University Psychiatry Foundation*, 580 F.Supp. 527, 538 (D.Kan. 1984).

2. In erroneously alleging that plaintiff sued the individual defendants as agents of the University, this Court has also overlooked or put itself in clear conflict with the United States Supreme Court in *Pennhurst State School & Hospital v. Halderman*, 465 US 89, 102 (1984) wherein the Supreme Court held:

> . . . a suit challenging the constitutionality of a state official's action is not one against the State. This was the holding in Ex parte Young, 209 US 123, 52 L Ed 714, 28 S Ct 441 (1908) . . . The theory of the case was that an unconstitutional enactment is "void" and therefore does not "impart to (the officer) any immunity from responsibility to the supreme authority of the United States." Id., at 160, 52 L Ed 714, 28 S Ct 441. Since the State could not authorize

> the action, the officer was "stripped of his official or representative character and (was) subjected in his person to the consequences of his individual conduct." Ibid.

This mandate of the Supreme Court was recently recognized by the U.S. District Court for the District of Kansas in *Barger v. State of Kan.*, 620 F.Supp. 1432 (D.C. Kan. 1985) wherein the District Court cited to additional landmark decisions of the Supreme Court as well, such as *Florida Department of State v. Treasure Salvors, Inc.*, 458 US 670, 684-85 and *Scheuer v. Rhodes*, 416 US 232, 238. As plaintiff stated on page 29 of her Principal Brief, citing to *Barger*, defendants Johnson, Hanson, Lineberry, Smith and Tacha, in party with others, clearly acted outside the scope of their employment (although under color of state law), since it clearly is *not* within the scope of their employment to violate a fellow employee's Constitutional rights. This Court has made a transparent revision of plaintiff's claims which are clearly supported by the record in its entirety as well as by the decisions of the Supreme Court cited to with specificity *supra*.

3. This Court further ignores and misconstrues the entire record in holding that the District Court did not err in granting summary judgment on plaintiff's section 1983 claim because collateral estopped barred relitigation of the issues that formed the basis of her claim (Opinion, p. 5). As plaintiff stated with specificity in her principal Brief (pp. 35-37), prior to trial in her prior case, Judge Rogers granted defendant University of Kansas (the sole remaining defendant in that case) its motions in limine which precluded reference at trial to, *inter alia*, statements or inferences that:

(1) plaintiff has any claim against defendant University other than a claim for back pay in salary under Title VII and/or a claim for liquidated damages under the Equal Pay Act;

(2) plaintiff has claims against defendant University pursuant to other civil rights statutes, including 42 U.S.C. §§ 1981, 1983, 1985, 1986, Title IX or constitutional claims pursuant to the First, Fifth and Fourteenth Amendments;

(3) plaintiff has any claim against any individual formerly named as a defendant or whom she proposed to name as a defendant in an amended complaint;

(4) individuals whom plaintiff named or once proposed to name as defendants in the present lawsuit slandered plaintiff or that plaintiff has a claim against an individual for slander;

* * * * * *

In the same order (Doc. 294 in *Dorothy Willner v. University of Kansas*, Case No. 82-4291) (See Attachments to plaintiff's Reply Brief, Ex. 4), Judge Rogers added:

> The court finds defendant's motion should be granted with regard to these matters. They are irrelevant to the issues that are now before the court. Plaintiff is instructed not to refer to these matters during trial.

Furthermore, as the record clearly shows (plaintiff's Reply Brief in Case No. 87-1869, pp. 11-12 and Ex. 8-12 in Attachments thereto), five of the six individual defendants herein, defendants Budig, Hanson, Johnson, Lineberry and Tacha, were named as defendants in Case No.

82-4291 in a Motion to Amend which plaintiff filed on 12/13/83 but which Magistrate van Bebber denied, although said denial was in clear violation of F.R.Civ.P. 15(a) according to the standard enumerated by the Ninth Circuit in, *inter alia, Mayes v. Leipziger,* 792 F.2d 605 (9th Cir. 1984). Clearly, no determination could be made in the previous case of the issues which were in limine at trial. In addition, Judge Rogers repeatedly threatened dismissal of plaintiff's previous case when she sought to call the witnesses necessary to litigate issues involving individual defendants (See Attachments to Principal Brief, Case No. 87-1249, Ex. 33, 33a). Since plaintiff's claims in this action in District Court were *solely* against individual defendants in their individual capacities and *not* against them as agents of the University of Kansas, this Court clearly errs on face of record in asserting that she was given a full and fair opportunity to prove allegations of retaliation and harassment against these defendants in her previous action.

4. Whether res judicata or collateral estoppel operates to bar claims is a mixed question of law and fact subject to de novo review. *A & A Concrete v. White Mountain Apache Tribe,* 781 F.2d 1411 (9th Cir. 1986). In holding that the District Court did not err in granting summary judgment on plaintiff's 1983 claims because of collateral estoppel, this Court ignores and misconstrues holdings of the United States Supreme Court in a series of decisions. In *Commissioner v. Sunnen,* 333 US 591, 599-600, the Supreme Court held that it is basic that the principle of collateral estoppel

> . . . must be confined to situations *where the matter raised in the second suit is identical in all respects with that decided in the first proceeding* and where

> the controlling facts . . . remain unchanged. (emphasis supplied)

In *Montana v. United States*, 44 US 147, 153, 162 (1979), the Supreme Court held

> Under collateral estoppel, once an issue is actually and necessarily determined by a court of competent jurisdiction, that is conclusive in subsequent suits based on a different cause of action *involving a party to the prior litigation. Parklane Hosiery Co. v. Shore*, 439 US 322, 326 n 5, 58 L Ed 2d 552, 99 S Ct 645 (1979). . . (emphasis supplied)

Citing to Restatement (Second) of Judgments § 27 (1982) cited with approval in *National Treasury Employees Union v. Internal Revenue Service*, 765 F.2d 1174, 1176 (D.C. Cir. 1985) and to *Montana*, the Court of Appeals for the District of Columbia in *Hastings v. Judicial Conference of U.S.* 829 F.2d 91 (D.C. Cir. 1987) at 98 stated:

> At the outset we note *the general rule of issue preclusion*: (W)hen an issue of fact or law is *actually litigated* and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action *between the parties* . . . (emphasis supplied).

Defendants in this action plainly were *not* parties to plaintiff's previous case. This Court is in clear conflict with landmark decisions of the Supreme Court as well as the general rule of issue preclusion in holding that the District Court did not err in granting summary judgment on plaintiff's 1983 claims.

5. In *Beck v. Kansas University Psychiatry Foundation*, 580 F.Supp. 527, 532, Judge Saffels, the District

Court judge in this case, enumerated the 10th Circuit standard for summary judgment:

> A motion under Rule 56 will be denied unless the movant demonstrates beyond a reasonable doubt that he is entitled to a favorable ruling. *Madison v. Deseret Livestock Co.*, 574 F.2d 1027 (10th Cir. 1978); *Mustang Fuel Corp. v. Youngstown Sheet & Tube Co.*, 516 F.2d 33 (10th Cir. 1975). Pleadings and documentary evidence are to be construed liberally in favor of a party opposing a Rule 56 motion. *Harman v. Diversified Medical Investments Corp.*, 488 F.2d 111 (10th Cir. 1973), *cert. denied* 425 U.S. 951, 96 S.Ct. 1727, 48 L.Ed.2d 195 (1976).

Moreover, as the Tenth Circuit Court of Appeals ruled in *Luckett v. Bethlehem Steel Corp.*, 618 F.2d 1373, 1377 (10th Cir. 1980):

> . . . the appellate court considers a summary judgment in the same manner as the trial court since the trial court has no real discretion in determining to grant summary judgment. 6 Moore's Federal Practice 56-23, p. 56-1394; see *Radobenko v. Automated Equipment Corp.*, 520 F.2d 540, 543 (9th Cir.). We do not examine the trial court's rulings under the "clearly erroneous standard" of Rule 52 F.R.Civ.P., but instead apply the strict standard of Rule 56. *Exnicious v. United States*, 563 F.2d 418, 423 n.9 (10th Cir.); *National Aviation Underwriters v. Altus Flying Service, Inc.*, 555 F.2d 778, 781 n.6 (10th Cir.).

Rule 56(e) states:

> . . . When a motion for summary judgment is made and supported as provided in this rule, an adverse

> party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.

According to Rule 56(c), "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," all serve to show whether there is a genuine issue as to any material fact. The Supreme Court held in *Celotex Corp. v. Catrett*, 106 S.Ct. (1986):

> Rule 56(e) permits a proper summary judgment motion to be opposed by any of the kinds of evidentiary materials listed in Rule 56(c) except the mere pleadings themselves, and it is from this list that one would normally expect the nonmoving party to make the showing to which we have referred.

5. This Court has disregarded the record and misconstrued both facts and law in holding (Opinion, p. 6) that the District Court properly granted summary judgment on her section 1985 and section 1986 claims and on her pendant state law claims of, at the least, slander and intentional infliction of emotional distress. *Luckett, supra*, mandates that the appellate panel consider a motion for summary judgment de novo. It is a fact of record, clear on face of the docket of this case in District Court, that plaintiff went far beyond her pleadings and provided documentary evidence, including memoranda by defendants and letters by and to defendants and others, showing the existence of a conspiracy to violate plaintiff's Fourteenth Amendment right to procedural due process (*See* plaintiff's Principal Brief in Case No. 1249,

pp. 1-7, 19-22, 27-35, 38-46 and 48-52 and Reply Brief, pp. 9-12, 14-19 *and* the Exhibits specified therein and attached thereto) without cause, without her knowledge thereof, and in clear violation of her liberty interests. It is a fact of record that this conspiracy and the accompanying abuse and oppression of plaintiff by defendants, in party with others, inflicted emotional distress on her to the point of resulting in stress-inflicted back spasms and migrane headaches and, more recently, recurrent angina-like chest pains. The entire record of this case in District Court bulges with documentary evidence. This Court has disregarded the record of facts and evidence brought before it. Plaintiff met the burden of proof set forth in *Celotex* and properly opposed defendants' Motion for Summary Judgment on most, if not all, of her claims against all defendants, including, but not limited to, her claims under sections 1985 and 1986. Summary judgment should not have been granted according to the standards enumerated by the Court of Appeals for the Tenth Circuit in *Madison, supra*, as well as in *Romero v. Union Pacific Railroad*, 615 F.2d 1303, 1308. According to *Romero*, when issues of motives are involved, summary judgment is to be most cautiously considered. *See* also *United States v. O'Block*, 788 F.2d 1433 (10th Cir. 1986): "Summary judgment is inappropriate if an inference can be deduced from the facts which would allow the nonmovant to prevail . . . Where different ultimate inferences may properly be drawn, the case is not one for summary judgment."

6. This Court also is in conflict with *Celotex* as regards the burden on movants in a Motion for Summary Judgment. As Justice Brennan, joined by the Chief Justice and Justice Blackmun, stated in *Celotex*:

> . . . as the Court confirms, a party who moves for summary judgment on the ground that the nonmoving party has no evidence must affirmatively show the absence of evidence in the record. *Ante,* at 5. This may require the moving party to depose the nonmoving party's witnesses or to establish the inadequacy of documentary evidence . . .

As the record clearly shows, movants failed to establish the inadequacy of plaintiff's documentary evidence on every element of each of plaintiff's claims, despite their deposition of her. In consequence, this panel itself has failed to go beyond conclusory assertions in support of its sweeping holding that the District Court properly granted summary judgment on all of plaintiff's claims. It has merely asserted:

> The defendants met their initial responsibility by demonstrating the absence of sufficient evidence necessary to establish all the essential elements of each of Willner's claims. Willner failed to meet her burden to go beyond her pleadings and designate specific facts showing that there were genuine issues for trial on every element of each of these claims. See *Celotex Corp. v. Catrett,* 106 S.Ct.

Since the assertion that plaintiff failed to go beyond her pleadings blatantly and flagrantly disregards the record, it appears that this panel asserted its conclusory allegations without citing to support from the record because the record could not provide such support. The entire record simply cannot provide an affirmative showing by defendants of the *absence* of sufficient evidence necessary to establish all the essential elements of each of plaintiff's claims. On the contrary, the record in its entirely clearly

establishes that *movants* failed to demonstrate, according to the standards enumerated by the Tenth Circuit, that they were entitled to summary judgment on all plaintiff's claims. As Justice Brennan, joined by the Chief Justice and Justice Blackmun, also stated in *Celotex*:

> Plainly a conclusory assertion that the nonmoving party has no evidence is insufficient. See *ante* at 1 (White, J. concurring). Such a "burden" of production is no burden at all and would simply permit summary judgment procedure to be converted into a tool for harassment.

II

7. In affirming the District Court's award of attorneys' fees to defendants in this case in District Court, this panel has joined the District Court in blatantly disregarding both facts and law. It is clearly established on face of record in the Briefs of plaintiff in Case No. 87-1869 and in the attachments thereto that plaintiff has repeatedly claimed the right *not* to have attorneys' fees assessed against her, said right mandated by the United States Supreme Court in the landmark case of *Hughes v. Rowe*, 449 US 5, 101 S.Ct. 173, 66 L.Ed.2d (1980). Following the standard it had set in *Christiansburg Garment Co. v. EEOC*, 434 US 412, 98 S.Ct. 694, 54 L.Ed.2d 648 (1978), the Supreme Court held that the same standard for assessing attorneys' fees applied in a civil rights action under 42 U.S.C. § 1983, namely that

> The plaintiff's action must be meritless in the sense that it is groundless or without foundation. The fact that a plaintiff may ultimately lose his case is not in itself a sufficient justification for the assessment of fees.

The Supreme Court further held in *Hughes* at 179 that

> An unrepresented litigant should not be punished for his failure to recognize subtle factual or legal deficiencies in his claims.

On these theories of law, the Supreme Court ordered that the award of attorneys' fees to defendants in *Hughes v. Rowe* in the lower courts be vacated.

8. In its Opinion, p. 9, this panel refused to find that plaintiff's appeal is totally without merit. Therefore, it denied defendants' request for costs, expenses and attorneys' fees in the Appeal. However, it refused to order that the award of costs and attorneys' fees by the District Court be vacated, in clear conflict with the mandate of the Supreme Court in *Hughes v. Rowe*. It further joined the District Court in refusing to take cognizance of *Hughes v. Rowe* and plaintiff's repeated citation to this Supreme Court case and its holdings. This panel has turned its back on the right of plaintiff *not* to have attorneys' fees assessed against her at the District Court level according to the clear mandate of the Supreme Court.

III

9. This panel has disregarded the law in affirming a ruling by the District Court wherein it sanctioned plaintiff for having brought before the District Court clear evidence that defendants were imposing on her redundant and duplicative discovery in plain violation of the 1983 Amendment to Rule 26. *See* plaintiff's Principal Brief in Case No. 87-1249, pp. 8-10, 48-49 and Principal Brief in Case No. 87-1869, pp. 4-5, 26, and the exhibits and documentary evidence specified therein and attached to plaintiff's Briefs.

10. In affirming this imposition of sanctions, this panel has overlooked and ignored the standard of the Tenth Circuit for the imposition of discovery sanctions as enumerated in *State of Ohio v. Arthur Anderson & Co.*, 570 F.2d 1370 (10th Cir. 1978). In said case, the Tenth Circuit held that "a willful, deliberate and flagrant scheme of delay and resistance in discovery matters" justified an order imposing sanctions. The facts in said case apparently included, *inter alia*, "ultimate and reluctant production of documents over more than a year after legitimate requests" and "disobedience of a discovery order." As the entire record in this action plainly discloses, the facts could not be more different in plaintiff's case in District Court. She did *not* withhold documents but rather brought to the notice of the District Court in her response to a compel motion of defendants that defendants already had in their possession, custody or control in documents all the discovery they redundantly and duplicatively sought from her pursuant to another discovery rule. Furthermore, the Court did not sanction and could not sanction plaintiff for "disobedience of a discovery order", since, in its order, it imposed monetary sanctions on her for "misplaced and inappropriate references to her earlier case in District Court. It imposed said monetary sanctions in clear disregard of the fact that defendants, not plaintiff, had initiated references to said case in this one and had repeated references to it before the Magistrate sanctioned plaintiff for her references. The District Court abused its discretion and plaintiff's First Amendment rights in sanctioning plaintiff for protesting defendants' violation of the 1983 Amendment to Rule 26, *inter alia*.

11. Furthermore, *Shaklee Corp. v. Gunnell*, 748 F.2d 548, 550 (10th Cir. 1984), to which this Court cites in

upholding the imposition of monetary sanctions by the District Court, actually supports plaintiff. In *Shaklee,* the Court of Appeals for the Tenth Circuit *set aside* rather than upheld the District Court's ruling on discovery.

IV

12. This panel has overlooked and misconstrued the record in erroneously stating (Opinion, p. 8) that plaintiff has appealed the District Court's failure to sanction defendants for their assertion that she suffers "mental infirmities." In point of fact, as plaintiff's Principal Brief in Case No. 87-1249 clearly evidences (*See* pp. 6-7, 43-47 and exhibits specified therein and attached thereto), plaintiff appealed the District Court's order of November 25, 1985, wherein Judge Saffels himself stigmatized her as being mentally ill in finding defendants' allegation that plaintiff suffers "mental infirmities" to be "perfectly proper." Thus, on the one hand, Judge Saffels made himself party to stigmatization of plaintiff as being mentally ill, although he did so without citing to or bringing forward any evidence whatsoever in support of said assertion by defendants which is false. On the other hand, he granted defendants summary judgment on plaintiff's tort claim for slander (*See* her Principal Brief in Case No. 87-1249, p. 41) in clear violation of the Supreme Court's standard as enumerated in *Celotex, supra,* apparently on the basis of his own unsupported finding that defendants' assertion plaintiff suffers "mental infirmities" is "perfectly proper."

13. Furthermore, Judge Saffels stigmatized plaintiff shortly after she brought to his notice her letter to the Senate Judiciary Committee in opposition to defendant Tacha's confirmation as a Judge of *this* Circuit Court of

Appeals and in connection with said opposition. This panel has overlooked and misconstrued the clear evidence in the record in its entirety that Judge Saffels joined defendants in slandering and stigmatizing plaintiff because of her exercise of her First Amendment right to speak out on matters of public interest. This panel has overlooked Judge Saffels' violation of plaintiff's Fourteenth Amendment rights.

V

14. This panel has asserted (Opinion, pp. 7-8) that "Willner's allegation that Judge Saffels was biased against her is unsupported by any facts." In so doing, it ignored the record of repeated and, ultimately, unremitting errors of fact and law by Judge Saffels in his rulings in plaintiff's case in District Court, as set forth with specificity in her Briefs in these appeals and the exhibits thereto. This panel's justification of said blatant disregard of the record is its ruling in plaintiff's earlier Appeal, *Dorothy Willner v. University of Kansas, et al.*, Case No. 86-2678, that "a motion to recuse cannot be based solely on adverse rulings." In point of law, however, there is disagreement among Circuits on adverse rulings as a basis for disqualification. In *Wolfson v. Palmieri*, 396 F.2d 121 (2nd Cir. 1968), the Court of Appeals for the Second Circuit noted that to establish the extra-judicial source of bias and prejudice would often be difficult or impossible and this is not required. Comments and rulings by a judge during the trial of a case may well be relevant to the question of the existence of prejudice. In *United States v. Holland*, 655 F.2d 44 (5th Cir. 1981) and in *Whitehurst v. Wright*, 592 F.2d 834, 837 (5th Cir. 1979), the Court of Appeals for the Fifth Circuit held that there is an exception to the mandate of 28 U.S.C. § 455 that bias sufficient to dis-

qualify a judge must stem from an extrajudicial source. Said exception is "where such pervasive bias and prejudice is shown by otherwise judicial conduct as would constitute bias against a party."

15. In point of fact, the bias and prejudice pervasively shown by Judge Saffels in his judicial conduct in this case in District Court did not begin until *after* plaintiff brought to his notice her opposition to defendant Tacha's confirmation as a Judge of this Circuit Court of Appeals, a fact which clearly is and should be extrajudicial to his rulings in her case in his Court.

16. In point of fact, the bias and prejudice pervasively shown by Judge Rogers toward plaintiff after she became pro se in her case, *Dorothy Willner v. University of Kansas, et al.* has a clear basis in his many close, personal ties to the University of Kansas as Director of its Alumni Association, as President of the Board of Governors of its Law School during the pendancy of plaintiff's action in his Court and as Director of its Endowment Association whereby he has a personal interest in the outcome of any litigation that could adversely affect the level of contributions to the University of Kansas. Judge Rogers' intentional dissembling of said ties, after plaintiff moved that he disqualify himself on the basis of his having been Director of KU's Alumni Association during the pendancy of her charge against KU to the EEOC, makes it clear that he had no intention of disqualifying himself in plaintiff's action in his Court pursuant to the reasonable man standard of 28 U.S.C. § 455(a) or any other standard. Despite this panel's assertion in its decision in Case No. 86-2678 that "the allegation that Judge Rogers is personally biased against Dorothy Willner is unsupported by any facts," the facts of Judge Rogers' extrajudicial manifold close personal association with the Uni-

versity of Kansas mandated his recusal pursuant to 28 U.S.C. § 455(b)(5)(i) as did his *ex parte* communication with the Office of the Attorney General of the State of Kansas. (See 28 U.S.C. 455(b)(1).

17. This panel not only has condoned Judge Rogers' abuse of discretion in flouting the mandate of 28 U.S.C. 144 and 455(b) by refusing to recuse himself in *Dorothy Willner v. University of Kansas, et al.* and in violating her Fourteenth Amendment right to a fair trial. This panel has also joined Judge Rogers and Judge Saffels in stigmatizing her, in chilling any possibility she might otherwise have had for professional employment outside the University of Kansas and in laying the ground for an alteration of her legal status as a tenured full-time professor in the Department of Anthropology and in the University of Kansas on the ground that she is a disruptive element. For this panel has stated in its Opinion in Case No. 86-2678 extremely prejudicial findings which it has attributed to the District Court, such as

> The district court also found that Professor Willner's interpersonal problems in the department were a result of her abusive and arrogant manner. The district court also heard testimony regarding Willner's unwillingness to sit on committees, or to submit her course schedules on time. Other witnesses testified concerning her abusive behavior and threats she made to colleagues.

This panel also misconstrued and repeated in its Opinion in this case Judge Saffels' stigmatization of plaintiff, in party with defendants, as suffering mental infirmities. Thus, this panel has repeated or reframed extremely prejudicial findings in Opinions which it has directed be published and which will be disseminated nationally and

internationally. In so doing, it has inflicted on plaintiff intense emotional distress and the physical consequences thereof to the point where she is once again continual angina-like symptoms which can bring on angina itself.

18. In point of fact, however, the evidence plaintiff put before Judge Rogers at trial clearly showed that it has been plaintiff's colleagues who have openly abused and threatened her since 1977 when she exercised her First Amendment rights in a protected act under Title VII. Evidence of her witness, Nancy Sempolski, also disclosed that plaintiff and her sister have been criminally defamed as incestuous lesbians at KU since 1976 and this has since been confirmed to plaintiff by another former student at KU. Furthermore, this panel has disregarded the plain evidence in the record that Judge Rogers abused plaintiff by forcing her to trial without the possibility of appropriate representation by counsel while she still had obligations to defendant University and its students and in callous disregard of her almost continual physical pain until she collapsed at trial. Having violated her Due Process Right to a fair trial, Judge Rogers then defamed plaintiff in his Opinion and, possibly, extra-judicially as well according to a defamatory newspaper story (*See* Plaintiff's Petition for Rehearing in Case No. 86-2678, pp. 9-13).

19. Furthermore, Judge Rogers' defamation of plaintiff was in clear disregard of another case in his Court, *Murray and Sempolski vs. Crawford, Horowitz, McNall, Squier, Frayer, Montet-White, Argersinger, Stull, Nicklas, Janzen, Moos,* Case No. 84-4302, wherein the sworn testimony of students clearly evidenced how faculty in the Anthropology Department of the University of Kansas used committees, *inter alia*, to sanction and harass grad-

uate students who resisted improper demands on them by faculty or who exercised their First Amendment rights on matters of public interest. Having found herself used in one such committee to deprive an excellent graduate student of a teaching assistantship on unproved allegations of Professor Moos, having afterwards heard from the student herself of protests she made on the grounds that Professor Moos had sexually harassed her, having been subjected to harassment herself, plaintiff has been unwilling to sit on committees wherein she could be pressured again to collude and collaborate in punishing students for proper exercise of their First Amendment rights. Judge Rogers' findings stigmatizing plaintiff, which this panel has repeated and directed be published, clearly were unfair in the light of the entire record in District Court, in the light of his many close personal ties to defendant University of Kansas and in the light of his violation of plaintiff's Due Process Right to a fair trial. Judge Saffels' findings similarly were unwarranted, unfair and stigmatizing to plaintiff.

20. Furthermore, during the past academic year, defendant Lineberry herein, in party with Robert J. Squier and others, have continued to try to force plaintiff to take early retirement or accept other unwarranted and prejudicial alterations in her legal status as a tenured, full-time professor in the Department of Anthropology and in the University of Kansas on false and pretextual grounds in clear violation of her contractual rights to procedural due process. On November 25, 1987, Professor Squier (who admitted animus toward plaintiff since 1972 because of her exercise of First Amendment rights which are also contractually granted at KU) sent plaintiff a certified letter to her home in which he proposed that she: 1) consider an appointment of less than full time;

2) consider early retirement; 3) consider an extended sick leave; 4) consider a leave without pay for the following semester and the academic year after that. On December 18, 1987, defendant Lineberry sent plaintiff a certified letter urging on her the suggestions made by Professor Squier in his letter of November 25, 1987, terming them "very constructive suggestions and ones which you should seriously consider." From then until the end of April 1988, Dean Lineberry continued to thrust on plaintiff such prejudicial options in clear violation of her contractual rights to procedural due process before any change in her legal status as a tenured, full-time professor in the Department of Anthropology and in the University of Kansas. At the same time, harassment of plaintiff instigated by Dr. Squier, which she brought to the notice of this panel in her Reply Brief in Case 87-1249, page 12 thereof and Exhibits 8-20 thereto, has continued without any pretense of procedural due process in support thereof. This panel's published Opinions can only encourage continued violation of plaintiff's Due Process Rights in continued attempts to alter her legal status in her employment pretextually and prejudicially.

WHEREFORE, appellant prays that a rehearing be granted and that on rehearing granted this Court's opinion dated June 1, 1988, be withdrawn and that the Court enter a new opinion reversing the judgment of the District Court on all her issues. Dated this 19th day of June, 1988.

/s/ Dorothy Willner
Dorothy Willner
Plaintiff-Appellant Pro Se
2112 Terrace Road
Lawrence, Kansas 66044
(913) 843-4442

2112 Terrace Road
Lawrence, Kansas 66044
June 21, 1988

Honorable Eugene A. Wright
Honorable Arthur L. Alarcon
Honorable Cynthia Holcomb Hall
c/o Robert L. Hoecker, Clerk
United States Court of Appeals
Tenth Circuit
Denver, Colorado 80294

Re: 87-1249, Willner v. Budig

Dear Judges Wright, Alarcon and Hall:

In reviewing my Petition for Rehearing in the captioned case, I discovered an error therein which I should like to correct. I relied on my memory in writing the first sentence of paragraph No. 13 on page 11 and, on rechecking, I find that I confused my Motion for Reconsideration of the Court's Memorandum and Order of November 25, 1985, which was not filed until December 3, 1985, with an earlier pleading, which was filed on November 18, 1985.

The first sentence of paragraph No. 13 on page 11 of my Petition for Rehearing should read:

> Furthermore, Judge Saffels stimatized plaintiff shortly after she wrote a letter to the Senate Judiciary Committee in opposition to defendant Tacha's confirmation as a Judge of this Circuit.

Sincerely yours,

/s/ Dorothy Willner
Dorothy Willner
Plaintiff-Appellant Pro Se

xc: Robert T. Stephan
Rose Marino
J. Steven Pigg
Clifford T. Mueller
and to:
Honorable Dale E. Saffels

(3)

Supreme Court, U.S.
FILED
DEC 16 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-951

In the Supreme Court of the United States

OCTOBER TERM, 1988

DOROTHY WILLNER,
Petitioner,

vs.

UNIVERSITY OF KANSAS, GENE BUDIG, ARCHIE R. DYKES, DELBERT M. SHANKEL, FRANCES D. HOROWITZ, ROBERT P. COBB, DEANELL TACHA, ROBERT L. LINEBERRY, ROBERT S. HOFFMAN, ROBERT J. SQUIER, ANTA MONTET-WHITE, ALFRED E. JOHNSON, MICHAEL CRAWFORD, JOHN M. JANZEN, F. ALLAN HANSON, FELIX MOOS, DAVID FRAYER, ROBERT J. SMITH, DONALD STULL,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

ROSE MARINO
Special Assistant Attorney General
of the State of Kansas
Associate General Counsel
University of Kansas
227 Strong Hall
Lawrence, Kansas 66045
(913) 864-3276
Counsel for Respondents

44pp

QUESTIONS PRESENTED

1. Were petitioner's motions for disqualification of the district court judge untimely?
2. Does the Tenth Circuit's affirmance of the district court's denial of disqualification motions conflict with decisions of this Court or other circuits?
3. Can petitioner's willful failure to comply with court orders for more than six months be excused by her choosing to not work on three holy days?

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No. 88-951

In the Supreme Court of the United States

OCTOBER TERM, 1988

DOROTHY WILLNER,
Petitioner,

vs.

UNIVERSITY OF KANSAS, GENE BUDIG, ARCHIE R. DYKES, DELBERT M. SHANKEL, FRANCES D. HOROWITZ, ROBERT P. COBB, DEANELL TACHA, ROBERT L. LINEBERRY, ROBERT S. HOFFMAN, ROBERT J. SQUIER, ANTA MONTET-WHITE, ALFRED E. JOHNSON, MICHAEL CRAWFORD, JOHN M. JANZEN, F. ALLAN HANSON, FELIX MOOS, DAVID FRAYER, ROBERT J. SMITH, DONALD STULL,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

The University of Kansas and all individual defendants respectfully request that the Court deny the issuance of a petition for a writ of certiorari, seeking review of two judgments and opinions of the United States Court of Appeals for the Tenth Circuit entered on June 1, 1988. The opinions below are reported at 848 F.2d 1023 and 848 F.2d 1032.

STATEMENT OF THE CASE

Petitioner was hired as an associate professor of anthropology in 1966 and has been continued as an employee of the University of Kansas since that time. In December, 1982, petitioner filed her first lawsuit against the University of Kansas and twelve individual defendants, all University administrators or faculty members, in the federal District Court of Kansas in Topeka, Kansas, where the Honorable Richard D. Rogers sits as the sole district court judge. In the first action, Dist. Ct. Case No. 82-4291, the petitioner alleged discrimination by the University on the basis of sex in salary matters and retaliation by the University of Kansas, pursuant to 42 U.S.C. §2000 *et seq.* and the Equal Pay Act. Against the individual defendants, petitioner pleaded claims pursuant to 42 U.S.C. §§ 1981, 1983, 1985, and 1986.

On October 11, 1983, after ten months of litigation had passed, petitioner filed her first motion for disqualification of the district court judge. Concerning the untimeliness of this motion, the Tenth Circuit stated: "Discovery would have been completed by this time except for Dorothy Willner's recalcitrance in ignoring the defendants' request for more complete answers to their interrogatories." (Petitioner's Appendix, p.A10) Three years later, petitioner filed other motions for disqualification. The trial court, in denying each of petitioner's motions for disqualification, addressed each of the reasons alleged by plaintiff for disqualification of the judge. *See* Respondents' Appendices A-D, pgs. A1-23, *infra*. The Tenth Circuit held that the motions to recuse were untimely.

Now for the first time petitioner presents in her petition for a writ of certiorari the new allegation that the district judge served as a director of the University of Kansas Endowment Association, but there is neither evidence in the record nor an affidavit by petitioner to support this latest untrue statement.

On October 15, 1984, the district court dismissed the claims made against the individual defendants because plaintiff failed to

supplement interrogatory answers as directed by the court. Seventeen months had passed from the time defendants had served their interrogatories on petitioner in February, 1983. In addition, petitioner had not complied with two previous court orders to supplement her incomplete interrogatory answers, before the district court dismissed petitioner's claims against the individual defendants. See Respondents' Appendix E, p. A24, *infra*.

Petitioner's remaining claims against the University were tried in a fourteen-day trial in May, 1986, to the district judge after petitioner waived her right to a jury trial on the Equal Pay Act claim. In a lengthy opinion, the judge determined the issues on the merits against petitioner. (Petitioner's Appendix, p. A34)

In May, 1985, petitioner filed a second suit in the District Court of Kansas in Kansas City, Kansas, where the Honorable Dale E. Saffels sits as a district court judge. In the second action, Dist. Ct. No. 85-2288-S, petitioner alleged a conspiracy by six individual defendants, all administrators or faculty members of the University of Kansas, pursuant to 42 U.S.C. §§ 1983, 1985, 1986, and under pendant jurisdiction, various tort claims.

After the close of discovery in the second suit, defendants filed a motion for summary judgment, and the district court granted the motion and dismissed petitioner's claims.

REASONS WHY THE WRIT SHOULD BE DENIED

I.

No real conflict exists among the circuit courts concerning the need for motions for judicial disqualification to be timely filed.

This Court recognized timeliness as an implicit requirement for motions for judicial disqualification, filed pursuant to 28 U.S.C. §455, in *Liljeberg v. Health Services Corp.*, —U.S. —, 108 S.Ct. 2194, 100 L.Ed. 2d 855, 877 (1988). In *Liljeberg*, decided before the Tenth Circuit considered and denied a petition for rehearing in the present case, this Court affirmed a Fifth Circuit opinion to vacate a judgment and held that it was appropriate to do so in cases "*unless* it can be said that respondent did not make a timely request for relief." 108 S.Ct. at 2206 (emphasis added). In the present case, the Tenth Circuit found that petitioner's motions for disqualification were untimely. (Petitioner's Appendix, pgs. A9-A11) The Tenth Circuit's decision in this action is consistent with other circuit courts concerning the need for motions for disqualification to be timely filed.

In the present case, petitioner's first motion for disqualification was not made until ten months after she had filed her case; her second motion was filed more than three years after the case had begun and after petitioner had known for one year the information upon which she based that motion. In *Hinman v. Rogers*, 831 F.2d 937 (10th Cir. 1987), the Tenth Circuit found a motion to recuse untimely when events were alleged to have occurred three months prior to the time the motion was filed. The *Hinman* court stated that: "A motion to recuse must be filed promptly after the allegedly disqualifying facts are discovered." 831 F. 2d at 938. The Tenth Circuit also found untimely a motion filed over a year after the occurrence of proceedings giving rise to the alleged bias in *Franks v. Nimmo*, 796 F.2d 1230, 1234 (10th Cir. 1976). The court cited with approval *Smith v. Danyo*, 585 F.2d 83, 86 (3d Cir.

1978), in which the Third Circuit stated: "[T]he judicial process can hardly tolerate the practice of a litigant with knowledge of circumstances suggesting possible bias or prejudice holding back, while calling upon the court for hopefully favorable rulings, and then seeking recusal when they are not forthcoming."

In previous decisions as well as in the present case, the Tenth Circuit has followed the position of other circuit courts. *See Singer v. Wadman*, 745 F.2d 606, 608 (10th Cir. 1984), *cert. denied*, 470 U.S. 1028, 105 S.Ct. 1396, 84 L.Ed.2d 785 (1985) (motion to recuse under both 28 U.S.C. §§ 144 and 455(a) was untimely); *Oglala Sioux Tribe v. Homestake Min. Co.*, 722 F.2d 1407, 1414 (8th Cir. 1983); *United States v. Slay*, 714 F.2d 1093, 1094 (11th Cir. 1983), *cert. denied*, 464 U.S. 1050, 104 S.Ct. 729, 79 L.Ed. 2d 189 (1984); *Chitimacha Tribe of Louisiana v. Harry L. Laws Co.*, 690 F.2d 1157, 1164 (5th Cir. 1982); *In Re International Business Machines Corp.*, 618 F.2d 923, 932 (2d Cir. 1982). *See also Ann R. Willner v. University of Kansas*, 848 F.2d 1020, 1022–23 (10th Cir. 1988).

Petitioner's own citations of circuit court cases show that the circuit courts have recognized a timeliness requirement when considering motions filed pursuant to 28 U.S.C. §455. "Lack of a timeliness requirement encourages speculation and converts the serious and laudatory business of insuring judicial fairness into a mere litigation stratagem." *Delesdernier v. Porterie*, 666 F.2d 116, 121 (5th Cir. 1982), *cert. denied*, 459 U.S. 839 (1982). The Fifth Circuit in *Delesdernier*, noted that "[o]nly the Seventh Circuit has stated its opposition to any timeliness requirement." 666 F.2d at 122, f.n. 3, *citing SCA Services, Inc. v. Morgan*, 557 F.2d 110 (7th Cir. 1977). In fact, *Morgan*, 557 F.2d 110, is the only case petitioner cites which supports her position that timeliness is not required for a motion filed pursuant to §455. In a case decided after *Morgan*, the Seventh Circuit stated:

> Our decision stands alone, however. The Fifth Circuit has called the discussion in *Morgan* dicta and rejected the

> conclusion on the merits, reasoning that Congress did not put a time limit in §455 because time limits were already so firmly fixed in both statute and common law that there was no need to add another.

United States v. Murphy, 768 F.2d 1518, 1539 (7th Cir. 1985).

More recently the Seventh Circuit recognized that "[a]lthough *SCA Services, Inc. v. Morgan, supra*, 557 F.2d at 117, holds that there are no time limits on motions to disqualify under 28 U.S.C. §455, this position has been uniformly rejected in the other circuits." *Union Carbide Corp. v. U.S. Cutting Service, Inc.*, 782 F.2d 710, 716 (7th Cir. 1986).

The legislative history of the 1974 amendment to 28 U.S.C. §455 is not decisive about whether Congress intended to preserve the judicial gloss wherein courts had generally held that a timely objection under the old §455 was necessary. *See, e.g., Adams v. United States*, 302 F.2d 307, 309 (5th Cir. 1962). Thus, Congress' failure to state an explicit timeliness requirement for §455 "could as easily have been the result of a belief that the judicial gloss on old §455 would survive." *Delesdernier*, 666 F.2d at 121. Certainly, the circuit courts have continued the judicial gloss on the old §455 since 1974.

Petitioner's statement that there is "disarray in the circuits on both timeliness and the proper interpretation" of §455 (Petition, p. 15) is not substantiated by decisions of the circuit courts. This Court's attention is not warranted for an issue upon which the circuit courts agree.

II.

The Tenth Circuit's decision affirming the district court's denial of disqualification motions does not conflict with decisions of this Court or other circuits.

Petitioner asserts that there is a conflict between *Liljeberg v. Health Services Corp.*, 108 S.Ct. at 2194, and the decision of the

Tenth Circuit in the present case. However, the facts of the two actions are clearly distinguishable, and the treatment of the cases by the respective appellate courts was completely different. In *Liljeberg*, 108 S.Ct. at 2197, this Court affirmed the decision of the Court of Appeals for the Fifth Circuit, which had reversed the district court and found that the judge should have been disqualified. In the present action, the Tenth Circuit found that petitioner's motions for disqualification were untimely and affirmed the district court's denial of those motions.

Unlike this case, *Liljeberg* presented a situation in which an objective observer might have reasonably questioned the impartiality of the judge. In *Liljeberg*, the district judge was a member of the university's governing board, and he had attended meetings where the specific matter was discussed which he subsequently decided in court. In the present action, petitioner filed a Title VII action against the University of Kansas because she disputed the amount of her salary. District Judge Richard Rogers was not a member of the University of Kansas' governing body and had served only in alumni organizations. The Alumni Association is a separate entity from the University of Kansas and plays no role in the hiring, promotion and salary decisions for University employees, including faculty members of the anthropology department like petitioner.

In considering petitioner's motion, the district judge stated: "Plaintiff does not allege nor could she allege that I acquired any facts concerning this case during my service as a director with the University Alumni Association. The Court has no knowledge of this case other than what I have learned from perusing the court file." *See* p. A5, *infra*. The district judge then applied the "reasonable, objective man" standard for reviewing a motion for recusal. *See* p. A5, *infra*. Judge Rogers stated that he did not believe his "past association with the Alumni Association demonstrates actual bias under the circumstances of this case and I do

not think that a reasonable man would doubt my impartiality under these circumstances." *See* p. A5, *infra*.

More than three years later, petitioner alleged a new ground that the judge had a position on the Law School Board of Governors for the KU Law Society. This society, whose members are alumni of the law school, does not consider or decide personnel matters of the University. In denying this motion, the district court stated: "[P]laintiff has known about my previous association with the law school at the University of Kansas for over a year, and she has waited until a month before the trial of this case is to start to raise it in a motion for disqualification. This delay certainly makes this aspect of the plaintiff's motion untimely." *See* Respondents' Appendix B, p. A18, *infra*. The Tenth Circuit noted that the district judge's participation in alumni activities had been considered in an earlier case and that "in *Hinman*, another panel of this court concluded that the allegations in Myra Hinman's recusal requests did not support a motion for recusal under section 144 or section 455." (Petitioner's Appendix, p. A10, *citing Hinman v. Rogers*, 831 F.2d at 939–40.)

The district court's treatment of petitioner's disqualification motions is consistent with many appellate opinions which have denied motions for disqualification based on a judge's background where no specific facts "suggest that the trial judge would be anything but impartial in deciding the case before him." *Parrish v. Board of Commissioners of Alabama State Bar*, 524 F.2d 98, 101 (5th Cir. 1975) *(en banc), cert. denied*, 425 U.S. 944 (1976). "[A]n alumnus' interest in the general welfare of his alma mater hardly seems likely to manifest itself in a bias concerning a single staff employment decision." *Brody v. President & Fellows of Harvard College*, 664 F.2d 10, 12 (1st Cir. 1981), *cert. denied*, 455 U.S. 1027, 102 S.Ct. 1731, 72 L.Ed. 2d 148 (1982). The district judge's alumni service does not exceed what might be expected as background or associational activities with respect to the usual

district judge. *See Parrish*, 524 F.2d at 104 (5th Cir. 1975) (recusal not required in race discrimination action against state bar association in which trial judge was a past president); *State of Idaho v. Freedman*, 478 F.Supp. 33 (D.Idaho 1979) (recusal not required in case challenging ratification procedure for Equal Rights Amendment where trial judge held "prominent position" in the Mormon Church).

Petitioner improperly raises in her petition for a writ of certiorori a new and unsupported allegation against the district judge which she did not present to the district judge, nor by supporting affidavit, to the Tenth Circuit. Petitioner's latest allegation against the district judge was that he had been a director of the University of Kansas Endowment Association, but there is no evidence to support her statement either in the record, or in fact. Petitioner never made this allegation before the district court so that the judge would have had an opportunity to address petitioner's misunderstanding. Nor did the appellate court have any evidence upon which to consider petitioner's latest untrue allegation against the district judge. In *Hinman v. Rogers*, 831 F.2d 937, 940 (10th Cir. 1987) the Tenth Circuit decided that "allegations in the recusal request do not support the claim that the judge has a financial interest in defendant Kansas University Endowment Association."

The district judge repeatedly answered petitioner's unfounded allegations against him in a series of motions for disqualification. *See* Appendix C, p. A19, *infra* (denial that judge is biased because petitioner is Jewish); Appendix D, p. A23, *infra* (denial that judge was related to a defense attorney). The Tenth Circuit reviewed the district court's decisions on petitioner's various motions and found that the denial of the motions did not constitute an abuse of discretion. No conflict exists between *Liljeberg* and the Tenth Circuit's decision in the present case.

III.

The district court's orders to petitioner to supplement interrogatory answers did not impinge on petitioner's right to observe three holy days.

There is no merit in petitioner's contention that the court imposed discovery requirements incompatible with petitioner's religious observance. Defendants served interrogatories on petitioner in February, 1983. After receiving incomplete answers from petitioner on July 1, 1983, they filed a motion to compel complete answers. By order dated March 5, 1984, the magistrate directed petitioner to supplement her interrogatory answers by March 30, 1984. Petition failed to comply with this discovery order and had not done so when defendants filed a motion to dismiss on August 10, 1984. Prior to a September 18, 1984 hearing on defendants' motion, petitioner had "notice for more than one year . . . that the defendants were seeking a further response to their interrogatories." (Petitioner's Appendix, p. A12).

At a hearing in September, 1984, petitioner "indicated that she would need forty-five additional days to supplement the interrogatories" although she had failed to comply with the magistrate's order for more than six months. *See* Respondents' Appendix C, p. A20. After the hearing, in an order on September 19, 1984, the district court gave petitioner one final ten-day extension to supplement the interrogatory answers and explicitly advised petitioner that failure to obey this *second* order to respond fully to the interrogatories would result in dismissal of the claims against the individual defendants. *See* Respondents' Appendix E, p. A24, *infra*. Petitioner did not meet the unambiguous deadline set by the court, and on October 15, 1984, petitioner's claims against the individual defendants were dismissed. (Petitioner's Appendix, p. A26).

The district court would have been acting well within its discretion in granting the motion to dismiss on September 19,

1984. Petitioner's willful failure to comply with the court's order at that time had already continued for many months without justification. Instead, the district court judge chose to grant petitioner one last opportunity to correct her default and explicitly cautioned her that "[f]ailure to comply with this order will result in the dismissal of this action against the individual defendants." (Petitioner's Appendix, p.A27). Despite ample notice of the consequences of not meeting this final deadline, petitioner did not comply with the district court's order.

On appeal, petitioner challenged the September 19, 1984 order as an infringement of her constitutional right to exercise her religion. This contention is undermined by her six-month default that preceded the order, by the district court's willingness to give petitioner yet another opportunity to cure her failure, and by the fact that the first day of petitioner's religious observance was not until September 26, 1984. As the Tenth Circuit observed, petitioner "was given up to ten days to comply with the court's order. She was free to budget her time to complete her responsibilities to the court in less than the maximum allotted time and before September 26, 1984," the first day of the Jewish New Year. (Petitioner's Appendix, p.A14). In addition, as even petitioner concedes, the Jewish High Holy Days do not mandate abstention from work during the entire ten-day period between Rosh Hashanah and Yom Kippur, but at most require prayer and presence in synagogue for two days during Rosh Hashanah and one day on Yom Kippur.

The crux of a First Admendment freedom of religion claim is a governmentally imposed pressure on a person to forego the practice of a faith in such way that the person is forced to choose between following the precepts of the religion and complying with the requirements set by the state. *See, e.g., Sherbert v. Verner,* 374 U.S. 398, 404, 83 S.Ct. 1790, 10 L.Ed.2d 965, 970 (1963). "[I]t is necessary in a free exercise case for one to show the coercive

effect of the enactment as it operates against him in the practice of his religion." *Abington School District v. Schempp,* 374 U.S. 203, 223, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963).

With regard to obligations imposed by courts that may conflict with religious practices, it has been held that a criminal defendant's First Amendment interest in not having to attend trial on his holy day did not outweigh the compelling interest in using Fridays for trial days. *United States v. Fisher,* 571 F. Supp. 1236 (S.D.N.Y. 1983), *aff'd., United States v. Thomas,* 757 F.2d 1359 (2d Cir. 1985), *cert. denied,* 474 U.S. 819 (1985). In the present case, there is not even an arguable impingement, restriction or limitation on religious observance about which petitioner can complain. Besides the six months of her non-compliance with a discovery order, petitioner had seven days after September 19, 1984 in which to prepare five supplemental interrogatory answers, without regard to the three High Holy Days. The district court was extremely lenient in allowing petitioner a final opportunity to comply with the discovery order and cannot reasonably be accused of depriving petitioner of her right to observe her religion.

If a party fails to obey a court order to provide discovery, the court may dismiss the action. Fed.R.Civ.P. 37(b)(2)(C). The imposition of sanctions is within the trial court's discretion and will not be disturbed on appeal unless the court has abused its discretion. *Roadway Express, Inc. v. Piper,* 447 U.S. 752, 763, 100 S.Ct. 2455, 65 L.Ed.2d 488 (1980); *National Hockey League v. Metropolitan Hockey Club,* 427 U.S. 639, 642, 96 S.Ct. 2778, 49 L.Ed.2d 747 (1976). The Tenth Circuit affirmed the trial court's decision.

Petitioner here willfully disregarded two separate discovery orders. Her default had lasted for more than six months by the time the district court finally granted the motion to dismiss the individual defendants. No First Amendment issue or other important question of federal law is presented here upon which the granting of certiorari could be premised. Sup. Ct. Rule 17.1(c).

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

OFFICE OF THE ATTORNEY GENERAL
ROBERT T. STEPHAN

ROSE MARINO
Special Assistant Attorney General
of the State of Kansas
Associate General Counsel
University of Kansas
227 Strong Hall
Lawrence, KS 66045
(913) 864-3276

CLIFFORD T. MUELLER
DOUGLAS M. GREENWALD
McAnany, VanCleave & Phillips, P.A.
11900 W. 87th Street Parkway
Suite 200
Lenexa, KS 66215
(913) 888-9000

and

J. STEVEN PIGG
Fisher, Patterson, Sayler & Smith
400 Bank IV Tower
P.O. Box 949
Topeka, KS 66603
(913) 232-7761

Counsel for Respondents

APPENDIX

APPENDIX A

(August 30, 1984)

DOROTHY WILLNER,
Plaintiff,

vs.

UNIVERSITY OF KANSAS, ARCHIE R. DYKES, DELBERT M. SHANKEL, FRANCES D. HOROWITZ, ROBERT P. COBB, ROBERT S. HOFFMAN, ROBERT J. SQUIER, ANTA MONTET WHITE, FELIX MOOS, JOHN M. JANZEN, MICHAEL CRAWFORD, DAVID FRAYER and DONALD STULL,
Defendants.

Case No. 82-4291

In the United States District Court
for the District of Kansas

MEMORANDUM AND ORDER

This is an employment discrimination action brought by the plaintiff pursuant to 42 U.S.C. §§ 1981, 1983, 1985, 1986, 1988, 2000e *et seq.* (Title VII); 29 U.S.C. § 206(d) (Equal Pay Act); 20 U.S.C. § 1681, *et seq.* (Title IX); and the United States Constitution. Named as defendants are the University of Kansas; Archie R. Dykes, Chancellor; Delbert M. Shankel, Executive Vice CHancel-

lor[sic]; Frances D. Horowitz, Vice Chancellor, Dean of Graduate School, Associate Dean of Liberal Arts College; Robert P. Cobb, Executive Vice Chancellor, Dean of Liberal Arts College; Robert S. Hoffman, Associate Dean of Liberal Arts College; Robert J. Squier, Acting Chairman of Department of Anthropology; Anta Montet White, Chairman of Department of Anthropology; Felix Moos, Associate Chairman of Department of Anthropology; John M. Janzen, Associate Chairman of Department of Anthropology; David Frayer, Associate Professor of Anthropology; and Donald Stull, Associate Professor of Anthropology. This matter is presently before the court upon the following motions: (1) defendants' motion for more definite statement (Doc. #19); (2) defendants' motion to dismiss (Doc. #20); and (3) plaintiff's motion to disqualify the court (Doc. #78). Having carefully reviewed the pleadings that have been filed by both sides, the court is now prepared to rule.[1]

Plaintiff, with the aid of counsel, filed this case on December 1, 1982. Plaintiff's counsel has since withdrawn and now plaintiff is proceeding *pro se.* In her complaint, plaintiff alleges that she is a 55 year old Jewish American female. She further alleges that she has been employed by the University of Kansas as an anthropology professor since 1966. She contends that during her employment she has been discriminated against by the defendants in a variety of ways because of her race and sex. Plaintiff seeks actual damages in excess of $1,000,000.00 and punitive damages in excess of $2,000,000.00.

The court shall first consider plaintiff's motion for disqualification pursuant to 28 U.S.C. § 455(a) and 455(b)(1). In this motion, plaintiff suggests three reasons why my impartiality should be questioned in this case: (1) that I was a director of the University of

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1. On December 14, 1983, plaintiff asked for additional time to reply to defendants' motion to dismiss. The court granted plaintiff's motion without indicating a specific time for filing the supplemental material. To date, plaintiff has submitted nothing further with regard to the motion to dismiss. The court finds that it is now time to decide the motion.

Kansas Alumni Association when plaintiff filed her charge of discrimination against the University of Kansas with the Equal Employment Opportunity Commission; (2) that plaintiff has been informed that I was heard to make the following statement with regard to sex discrimination cases filed by females by the defendant University of Kansas: "Those women over there! If they don't get the high-paying jobs they want, they holler discrimination."; and (3) that plaintiff has observed my demeanor during a hearing toward another female plaintiff proceeding *pro se* and questions whether I am able to give full consideration to females litigating sex discrimination cases on their own behalf. I shall discuss each of these contentions specifically. However, I should initially discuss the general standards governing a motion to disqualify.

There are two statutes governing recusal of federal district judges: 28 U.S.C. §§ 144 and 455. Plaintiff seeks to invoke § 455 in support of her motion for disqualification. That statute provides in pertinent part:

> (a) Any justice, judge, magistrate, or referee in bankruptcy of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
> (b) He shall also disqualify himself in the following circumstances:
> (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

Although the statute imposes a self-enforcing duty upon the judge, its provisions may also be asserted by a party to the proceeding. *United States v. Gigax*, 605 F.2d 507, 511 (10th Cir. 1979).

Section 455(b)(1) is substantially similar to 28 U.S.C. § 144. Courts have concluded that the standards for disqualification for personal bias are identical under both. *See, e.g., United States v. Gigax, supra*, at 512; *United States v. Wolfson*, 558 F.2d 58, 62 (2d Cir. 1977). The standard is whether a reasonable person would conclude, on the basis of the facts alleged, that a judge is biased or

prejudiced against a particular litigant. *United States v. Conforte,* 624 F.2d 869, 880 (9th Cir. 1980), *cert. denied,* 449 U.S. 1012 (1980). To warrant disqualification of a judge under this section, a party must allege personal, extra-judicial bias or prejudice. *In re Corrugated Container Antitrust Litigation,* 614 F.2d 958, 965 (5th Cir. 1980).

Section 455 (a) is broader and more general in nature than either 28 U.S.C. § 144 or § 455(b)(1). It does not rest on the personal bias or prejudice structure of those two sections. It mandates that a judge disqualify himself "in any proceeding in which his impartiality might reasonably be questioned." This provision was added in 1974, and designed as a "catch-all" for situations not otherwise contemplated under the statutes but in which disqualification might be proper. *Rice v. McKensie,* 581 F.2d 1114, 1116 (4th Cir. 1978). Section 455(a) represents a recognition by Congress that the appearance of impartiality is as important as the fact of impartiality, *Webb v. McGhie Land Title Co.,* 549 F.2d 1358 (10th Cir. 1977), and its wording is borrowed from the ABA Code of Judicial Conduct. *United States v. Ritter,* 540 F.2d 459, 462 (10th Cir. 1976), *cert. denied,* 429 U.S. 951 (1976). Disqualification is warranted under this provision when a reasonable person measured by an objective standard would infer that a judge's impartiality might reasonably be questioned. *United States v. Gigax, supra,* at 511. Application of this "reasonable, objective man" standard must proceed in the context of allegations of concrete fact. *United States v. Corr,* 434 F.Supp. 408 (S.D.N.Y. 1977). A charge of partiality must be supported by a factual basis. *In re United States,* 666 F.2d 690, 695 (1st Cir. 1981). Rumors and innuendos must be ignored in considering whether disqualification is appropriate. *Id.* Section 455(a) should not be interpreted to require recusal on spurious or vague charges of impartiality. *Smith v. Pepsico,* 434 F.Supp. 524 (S.D. Fla. 1977).

The court shall now consider the various specific allegations made by the plaintiff in her motion. Plaintiff first suggests that I should disqualify myself from this case because I was a director of the

University of Kansas Alumni Association when plaintiff filed her charge of discrimination against the University of Kansas with the Equal Employment Opportunity Commission. Assuming this to be true, and I do believe that the dates of my prior service as a director of Alumni Association do coincide with plaintiff's filing of her charge with the EEOC, I find this fact insufficient to require my recusal in this case.

Plaintiff does not allege nor could she allege that I acquired any facts concerning this case during my service as a director with the University Alumni Association. The court has no knowledge of this case other than what I have learned from perusing the court file.

I do not believe my past association with the Alumni Association demonstrates actual bias under the circumstances of this case and I do not think that a reasonable man would doubt my impartiality under these circumstances. The mere association of a judge with a party, without indication that the judge stands to obtain financial or other gain from a particular outcome, is generally insufficient to mandate disqualification. *Brody v. President & Fellows of Harvard College,* 664 F.2d 10, 11 (1st Cir. 1981). I have reviewed a number of cases arising under § 455 and I do not think that my association with the Alumni Association is nearly as significant as other associations which have been found by various courts not to require recusal. *See, e.g., Huff v. Standard Life Ins. Co.,* 683 F.2d 1363 (11th Cir. 1982) (recusal not required where trial judge had previous affiliation with defendant's law firm); *Schultz v. Newsweek,* 668 F.2d 911 (6th Cir. 1982) (recusal not required where defendant newspaper in published editorials had supported trial judge's nomination to Circuit Court position); *Parrish v. Board of Commissioners of Alabama State Bar,* 524 F.2d 98 (5th Cir. 1975) *(en banc), cert. denied,* 425 U.S. 944 (1976) (recusal not required in race discrimination action against state bar association in which trial judge was a member); *Warner v. Global Natural Resources PLC,* 545 F.Supp. 1298 (S.D. Ohio 1982) (recusal not required

where trial judge had acquaintanceship with plaintiff and plaintiff had supported judge's nomination to the bench); *State of Idaho v. Freedman,* 478 F.Supp. 33 (D. Idaho 1979) (recusal not required in case challenging ratification procedure for Equal Rights Amendment where trial judge held "prominent position" in the Mormon Church); *Black v. Sullivan & Cromwell,* 418 F.Supp. 1 (S.D.N.Y. 1975) (recusal not required in sex discrimination class action where trial judge was previously an NAACP litigator). In sum, I find my prior service with the University of Kansas Alumni Association insufficient to require recusal here.

I now move to consideration of the statement allegedly made by me concerning sex discrimination cases filed by females at the University of Kansas. The presentation of this allegation presents much the same situation as that in *United States v. Hines,* 696 F.2d 722 (10th Cir. 1982). There, the defendant sought to disqualify the trial judge pursuant to 28 U.S.C. §§ 455(a) and 455(b)(1) based on a statement made by the judge. The defendant submitted an affidavit stating that someone had told him that the judge, sometime in November or December, 1979, while dining with friends at an unnamed dinner club in Tulsa, Oklahoma, stated to an unnamed person that he was "going to see to it that [Mr. Hines] gets put away." The trial judge refused to recuse himself and the Tenth Circuit affirmed. In finding that the defendant had failed to show adequate proof of prejudice or bias, the Court stated:

> Mr. Hines' affidavit fails to state with reasonable particularity when, where, and to whom the statement was made, nor has he identified the informant who heard the statement and reported it to Mr. Hines. His counsel also concedes that, notwithstanding the attorney-client privilege, Mr. Hines has not identified to him the source of the statement. Record, vol. 1, at 139. Mr. Hines states in summary fashion that the informant was known to him to be reliable and to have been in a position to hear the judge's statement, but he offers no underlying facts to support either his opinion of the informant's reliability or his belief that the informant was in a

> position to hear the statement. Justice would be impeded by a policy mandating recusal on such scant submissions. Although we acknowledge that the intent in amending section 455 was to negate even the appearance of partiality in judicial proceedings, section 455(a) must not be so broadly construed that it becomes, in effect, presumptive, so that recusal is mandated upon the merest unsubstantiated suggestion of personal bias or prejudice.

Id., at 729.

The statements made by the Tenth Circuit in *Hines* are particularly instructive here. In her motion, plaintiff fails to state with any particularity when, where and to whom the statement was made, nor has she identified who heard the statement and reported it to her. In accord with *Hines*, I find that plaintiff has failed to show sufficient proof of bias, prejudice or partiality.

Finally, I shall consider plaintiff's last allegation of prejudice or bias. Plaintiff contends that my demeanor in a hearing in another case concerning another female *pro se* plaintiff indicates some prejudice or bias against all females who are prosecuting cases in their own behalf. The law is clear that this allegation is insufficient for several reasons. First, as noted previously in this opinion, to warrant disqualification of a judge under § 455, a party must allege personal bias or the appearance of partiality arising out of that bias. Plaintiff's contention fails to allege any bias which could be considered "personal" to her. Second, plaintiff's allegation presents nothing more than her conclusions regarding my demeanor at some prior hearing in another case. The law is clear that only facts, and not conclusions, will serve as a basis for disqualification. *United States v. Bennett*, 539 F.2d 45 (10th Cir. 1976), *cert. denied*, 429 U.S. 925 (1976). Finally, the bias and prejudice under § 455 must be extra-judicial. Disqualifying bias, with certain limited exceptions none of which are applicable here, may not arise out of the proceedings in court before the judge. Thus, I find recusal is not required by this allegation made by plaintiff. *See Jackson v.*

Alabama Dept. of Public Safety, 657 F.2d 689 (5th Cir. 1981) (comments made by trial judge in another judicial proceeding do not require recusal).

In sum, I find plaintiff has not shown actual bias or prejudice and I do not think that a reasonable man would doubt my impartiality under the circumstances presented. Accordingly, plaintiff's motion for disqualification shall be denied.

Having decided the motion for disqualification, I shall move to the other motions presently pending in this case. The court shall first consider defendants' motion for a more definite statement. In this motion, defendants seek to have plaintiff provide a number of factual details regarding the allegations made by her in her complaint.

In *Grant v. Rusty's Food Center, Inc.,* No. 82-4289 (D. Kan., unpublished, 1/20/83), the court set forth the following standards for examining a motion for more definite statement:

> The decision whether to grant a motion for a more definite statement is a matter within the discretion of the trial court. *United States v. Metro Development Corp.,* 61 F.R.D. 83, 85 (N.D. Ga. 1973). Such motions, however, are generally disfavored. *Usery v. Local 866, International Brotherhood of Teamsters,* 72 F.R.D. 581, 582 (W.D. Okla. 1976). If a pleading meets the requirements of F.R.Civ.P. 8 and fairly notifies the opposing party of the nature of the claim, a motion for more definite statement should not be granted. *Wishnick v. One Stop Food & Liquor Store, Inc.,* 60 F.R.D. 496, 498 (N.D. Ill. 1973). In 5 Wright & Miller, *Federal Practice and Procedure: Civil* § 1376, p. 733, the rule regarding motions for a more definite statement is succinctly stated as follows:
>
> > [T]he class of pleadings that are appropriate subjects for a motion under Rule 12(e) is quite small—the pleading must be sufficiently intelligible for the court to be able to make out one or more potentially viable legal theories on which the claimant might proceed, but it must be so vague or ambiguous that the opposing party cannot respond, even with a simple denial, in good faith or without prejudice to himself.

> Moreover, it has been recognized that the purpose of a Rule 12(e) motion is "to strike at unintelligibility rather than want of detail." *U-Profit, Inc. v. Bromley, Ltd.*, 54 F.R.D. 60, 66 (E.D. Wis. 1971).

After reviewing plaintiff's complaint, we find that it sufficiently complies with Fed.R.Civ.P. 8. Further details about plaintiff's complaint can be obtained through interrogatories, depositions and other discovery. Accordingly, defendants' motion for more definite statement shall be denied.

In the motion to dismiss, defendants raise a number of issues. Many of these matters are familiar to the court. The court shall summarily dispose of several of the issues without discussion. The remaining questions will be discussed.

1. Plaintiff's claims against the defendant University of Kansas and the individual defendants in their official capacities pursuant to 42 U.S.C. §§ 1981, 1983, 1985 and 1986 are barred by the Eleventh Amendment. *Pennhurst State School and Hospital v. Halderman*, _____ U.S. _____ (January 24, 1984); *Brennan v. University of Kansas*, 451 F.2d 1287, 1290 (10th Cir. 1971); *Logan v. State of Kansas Department of Human Resources*, No. 83-4321 (D. Kan., unpublished, 6/12/84). These claims shall be dismissed. With the dismissal of these claims, the court shall also dismiss plaintiff's claim for attorney's fees against the University pursuant to 42 U.S.C. § 1988.

2. Compensatory and punitive damages are not allowable under Title VII. *Walker v. Ford Motor Co.*, 684 F.2d 1355, 1364 (11th Cir. 1982); *Pearson v. Western Electric Co.*, 542 F.2d 1150, 1151-52 (10th Cir. 1976); *Hinman v. University of Kansas*, No. 79-4069 (D. Kan., unpublished, 5/1/80). Any claim for such damages by plaintiff under Title VII shall be dismissed.

3. 42 U.S.C. § 1981 does not encompass claims based on sex or religious discrimination. *Manzanares v. Safeway Stores, Inc.*, 593 F.2d 968, 971 (10th Cir. 1979).

4. Plaintiff cannot obtain equitable relief in the form of back pay from the individual defendants under Title VII. *Padway v. Palches*, 665 F.2d 965, 968 (9th Cir. 1982); *Clanton v. Orleans Parish School Board*, 649 F.2d 1084, 1099 (5th Cir. 1981); *Dobrec v. Robinson*, No. 79-1671 (D. Kan., unpublished, 6/1/84). Such claims made by plaintiff are dismissed.

5. There is no right to a jury trial under Title VII. *United States v. Lee Way Motor Freight, Inc.*, 625 F.2d 918, 940 (10th Cir. 1979). This claim shall be tried to the court.

6. Plaintiff's claims against the University and the individual defendants brought directly under the Constitution pursuant to *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971) shall be dismissed. *Howard v. Topeka-Shawnee County Metropolitan Planning Commission*, No. 80-4199 (D. Kan., unpublished, 2/7/83); *Lee v. Wyandotte County*, No. 81-4276 (D. Kan., unpublished, 1/27/84).

The court shall now discuss the remaining issues raised by the defendants. We shall first address the service of process issues. Defendant University and defendant Horowitz contend that they were improperly served here. Plaintiff, in response to defendants' motion, has again served both the University and Horowitz. This additional service by plaintiff adequately complies with service requirements and thus we now find no merit to the defendants' arguments.

The individual defendants assert several arguments that plaintiff's claims under §§ 1983, 1985 and 1986 should be dismissed for failure to state a claim upon which relief can be granted. The gist of these contentions is that the complaint is bereft of facts to adequately state constitutional or statutory claims. The general rule with regard to such arguments is that complaints should not be dismissed unless it appears beyond doubt that plaintiff can prove no set of facts in support of her claim which would entitle her to relief. *Conley v. Gibson*, 355 U.S. 41 (1957). This complaint is

indeed not a model of pleading but we find it is sufficient to avoid a motion to dismiss for failure to state a claim. Several of these arguments might again be raised in a motion for summary judgment if discovery fails to reveal facts necessary to support these claims.

All defendants assert that plaintiff has adequately failed to plead a cause of action under the Equal Pay Act (EPA). The court has carefully examined plaintiff's complaint and we believe that a fair reading of that complaint adequately states a claim under the EPA. Accordingly, we shall not dismiss plaintiff's EPA claim against the defendants.

We now move to defendants' argument that plaintiff has failed to state a claim under § 1981 and Title VII based on race discrimination. Defendants argue that these statutes do not encompass racial discrimination based on the fact that an individual is Jewish. Plaintiff, relying upon *Manzanares v. Safeway Stores, Inc.*, 593 F.2d 968 (10th Cir. 1979), contends that she can sue as a Jew under § 1981 and Title VII for race discrimination.

Section 1981 provides, *inter alia,* that all persons within the United States shall enjoy the same rights and benefits of law as are "enjoyed by white citizens." The Supreme Court has held that the scope of § 1981 applied to acts of racial discrimination. *Johnson v. Railway Express Agency,* 421 U.S. 454, 459-60 (1975). It does not apply to discrimination based on sex or religion. *Runyon v. McClary,* 427 U.S. 160, 167 (1976). The Court has left open the question as to whether § 1981 applies to discrimination based on national origin. *Delaware State College v. Ricks,* 449 ULS. 250, 256 n. 6 (1980).

This court has applied the teaching of *Manzanares* in the past to allow and disallow § 1981 claims of discrimination based on a variety of ethnic or national origins. *See Fernando v. Brock Hotel Corp.*, No. 83-4057 (D. Kan., unpublished, 12/12/83) (allowed for Indian ancestry); *Schlaefli v. Daniel International Corp.*, No.

80-4052 (D. Kan., unpublished, 8/31/82) (allowed for American Indian); *Elkassabany v. King Radio Corp.*, No. 79-4193 (D. Kan., unpublished, 10/3/80) (allowed for Egyptian); *Mills v. American Yearbook Co., Inc.*, No. 81-4222 (D. Kan., unpublished, 7/26/82) (not allowed for Finnish ancestry); *Cavanaugh v. Harris Enterprises, Inc.*, No. 79-4177 (D. Kan., unpublished, 3/19/80) (not allowed for German).

Title VII is violated by discrimination on the basis of "race, color, religion, sex, or national origin . . ." 42 U.S.C. § 2000e-2 (c)(1). Plaintiff's complaint alleges solely sex and race discrimination. The complaint makes no mention of any discrimination based on religion or national origin. Thus, we consider plaintiff's Title VII claim as only a race and sex discrimination claim.

After examining the case law on this issue, we are forced to reach the conclusion that Jews do not constitute a race for purposes of § 1981 or Title VII. *Wald v. Teamsters*, 25 E.P.D. ¶ 31,497 (C.D. Cal. 1980). The court finds itself in agreement with the comments of the court in *Budinsky v. Corning Glass Works*, 425 F.Supp. 786 (W.D. Pa. 1977). There, the court, in dismissing a Slavic plaintiff's § 1981 claim of racial discrimination, stated:

> The terms "race" and "racial discrimination" may be of such doubtful sociological validity as to be scientifically meaningless, but these terms nonetheless are subject to a commonly-accepted, albeit sometimes vague, understanding. . . . On this admittedly unscientific basis, whites are plainly a "race" susceptible to "racial discrimination." Hispanic persons and Indians, like blacks, have been traditional victims of group discrimination, and, however inaccurately or stupidly, are frequently and even commonly subject to a "racial" identification as "non-whites." . . . .
>
> *The same cannot be said with respect to persons of Slavic or Italian or Jewish origin. These groups are not so commonly identified as "races" nor so frequently subject to that "racial" discrimination which is the specific and exclusive target of § 1981.* (emphasis added)

Id., at 788.

Therefore, we shall dismiss plaintiff's claims of racial discrimination based on § 1981 and Title VII.

Defendants next argue that there are several problems with plaintiff's Title VII claim. Defendants first suggest plaintiff's Title VII claim should be dismissed because her complaint fails to adequately allege that her administrative charge of discrimination was deferred to the Kansas Commission on Civil Rights (KCCR) as required by 42 U.S.C. § 2000e-5(c). Defendants note that plaintiff's complaint indicates only that plaintiff filed a charge of discrimination with the EEOC on April 27, 1981. In response, plaintiff has submitted documents which show that the EEOC received plaintiff's charge on April 27, 1981, and transmitted it to the KCCR on April 28, 1981. The documents further indicate that the KCCR declined to process the charge.

Once a state agency is given the opportunity to act and declines to do so, the EEOC can proceed at once to deal with the complainant's charge of discrimination. *Willner v. University of Kansas*, No. 79-4069 (D. Kan., unpublished, 5/1/80). The failure of a complainant to file charges with the state agency is not a fatal jurisdictional defect where the charge is filed with the EEOC, which as matter of policy, refers such complaints to the proper state agency. *Heiniger v. City of Phoenix*, 625 F.2d 842 (9th Cir. 1980). Given the facts presently before the court, we shall not dismiss plaintiff's Title VII claim.

Defendants next argue that plaintiff's Title VII claim should be dismissed because plaintiff's EEOC charge shows that it was not filed within 180 days of any alleged violations by the defendants. We cannot agree. The court finds that the EEOC charge sufficiently alleges violations of Title VII within 180 days of its filing. Accordingly, we find no merit to this argument. However, we do note that several of the allegations do appear to be outside the 180 time restriction. We believe that these matters should probably be addressed in a motion for summary judgment after discovery is complete.

Finally, certain individual defendants contend that plaintiff's Title VII claim against them should be dismissed because they were not named in plaintiff's EEOC charge of discrimination. The court has addressed this issue a number of times.

In *Romero v. Union Pacific Railroad*, 615 F.2d 1303 (10th Cir. 1980), the Tenth Circuit examined this issue and found that four factors should be considered in deciding whether a defendant unnamed in the EEOC charge could be named later in a Title VII suit. The four factors are:

> 1) whether the role of the unnamed party could through reasonable effort by the complainant be ascertained at the time of the filing of the EEOC complaint; 2) whether, under the circumstances, the interests of a named are so similar as the unnamed party's that for the purpose of obtaining voluntary conciliation and compliance it would be unnecessary to include the unnamed party in the EEOC proceedings; 3) whether its absence from the EEOC proceedings resulted in actual prejudice to the interests of the unnamed party; 4) whether the unnamed party has in some way represented to the complainant that its relationship with the complainant is to be through the named party.

Id., at 1312.

The court is and has always been reluctant to decide this issue on a motion to dismiss. We find it is better resolved after some discovery has been taken in the case. The instant case is no exception. Thus, we shall await a motion for summary judgment before thoroughly examining this issue.

The court shall now move to defendants' arguments regarding plaintiff's Title IX claim. The University first asserts that plaintiff's Title IX claim against it is barred by the Eleventh Amendment. The court agrees.

A clear showing of congressional intent is required to abrogate Eleventh Amendment immunity. *Quern v. Jordan*, 440 U.S. 332 (1979). No such congressional purpose is present here and thus

we find that plaintiff's Title IX action against the University is barred by the Eleventh Amendment.

Defendants also raise several other arguments concerning the Title IX claim. Defendants contend that plaintiff has no cause of action under Title IX because she has received no federal grants or funding. Defendants made this argument prior to the Supreme Court's decision in *Grove City College v. Bell*, _____ U.S. _____ (February 28, 1984). The court believes that both sides should examine this case before we decide this issue. At this time, we shall deny defendants' motion to dismiss based upon this argument but we shall allow defendant to raise it at a later date if they believe that *Grove City College* requires it.

As to defendants' remaining arguments regarding plaintiff's Title IX claim, the court believes they are meritorious. There is no right to damages or jury trial under Title IX. *Lieberman v. University of Chicago*, 660 F.2d 1185 (7th Cir. 1981), *cert. denied*, 456 U.S. 937 (1982).

Defendants next argue that plaintiff's slander claim fails to state a claim under § 1983. The court agrees. Claims of defamation by a state official, when no termination of employment is involved, are not cognizable under § 1983. *Paul v. Davis*, 424 U.S. 693, 710 (1976). Plaintiff contends that the court should consider this claim under its pendent jurisdiction if a § 1983 claim is not stated. The court will do so but only to the extent that such a claim is stated within the applicable one year statute of limitations. If discovery reveals that no such claim arose between December 1, 1981 to December 1, 1982, this claim shall be dismissed.

Finally, we shall consider defendants' statute of limitations argument. Defendants seek to have the court rule that plaintiff's claims under §§ 1981, 1983 and 1985 prior to either December 1, 1981 or December 1, 1980, are barred by the applicable statute of limitations. At this point, we are inclined to find, based upon the recent pronouncements of the Tenth Circuit, that December 1,

1979, is the key date, three years prior to the filing of plaintiff's complaint. *See Cotton v. Board of Education of U.S.D. # 259,* No. 82-4082 (D. Kan., unpublished, 5/3/84). The court shall examine this issue closer after discovery reveals the exact nature of plaintiff's claims.

The court notes that the individual defendants have recently filed a motion to dismiss. A hearing on this motion is hereby scheduled for September 18, 1984, at 8:30 a.m., in Room 401 of the Frank Carlson Federal Building, 444 S.E. Quincy, Topeka, Kansas.

IT IS THEREFORE ORDERED that plaintiff's motion for disqualification be denied.

IT IS FURTHER ORDERED that defendants' motion for more definite statement be denied.

IT IS FURTHER ORDERED that defendants' motion to dismiss be granted in part and denied in part.

IT IS FURTHER ORDERED that the pending motion to dismiss filed by the individual defendants shall be scheduled for a hearing on September 18, 1984, at 8:30 a.m.

IT IS SO ORDERED.

Dated this 29th day of August, 1984, at Topeka, Kansas.

/s/ Richard D. Rogers
United States District Judge

APPENDIX B

(February 18, 1986)

DOROTHY WILLNER,
Plaintiff,

vs.

UNIVERSITY OF KANSAS,
Defendant.

Case No. 82-4291

In the United States District Court
for the District of Kansas

O R D E R

This matter is presently before the court upon plaintiff's motion to the court to disqualify itself and plaintiff's motion for continuance and stay. Having carefully reviewed the materials before the court, we are now prepared to rule.

The court shall first consider the plaintiff's motion to disqualify. In this motion, plaintiff seeks to have me disqualified pursuant to 28 U.S.C. § 455(a) because (1) I previously served as the President of the Board of Governors of the law school at the University of Kansas, and (2) I am related to an attorney who previously appeared in this lawsuit. Plaintiff's previous attempt to have me disqualified in this case was denied. This attempt shall meet the same fate. For the reasons stated in my earlier order, I do not find that my service on the Board of Governors is sufficient to mandate my recusal in this action. *See* Doc. #128.

Further, plaintiff has known about my previous association with the law school at the University of Kansas for over a year, and she was waited until a month before the trial of this case is to start to raise it in a motion for disqualification. This delay certainly makes this aspect of the plaintiff's motion untimely. *See Singer v. Wadman*, 745 F.2d 606, 608 (10th Cir. 1984).

Plaintiff's allegation that I am related to an attorney who previously appeared in this case is completely untrue. I have no idea where plaintiff came up with this allegation, but it is incorrect and requires no further comment. Accordingly, plaintiff's motion for disqualification shall be denied.

The court shall next consider plaintiff's motion for continuance and stay. In this motion, plaintiff seeks a continuance of the March 10, 1986 trial date until "the Court has instructed Robert T. Stephan, Attorney General of the State of Kansas, who is defending defendant University, to indict agents of defendant University who are defendant University's witnesses for perjury, to try them for perjury and have such trial brought to conclusion and sentencing before the trial in the instant actions begins." This motion is entirely frivolous and shall be denied. This case shall proceed to trial on March 10, 1986.

IT IS SO ORDERED.

Dated this 18th day of February, 1986, at Topeka, Kansas.

/s/ Richard D. Rogers
United States District Judge

APPENDIX C

(March 13, 1985)

DOROTHY WILLNER,
Plaintiff,

vs.

UNIVERSITY OF KANSAS, et al.,
Defendants.

Case No. 82-4291

In the United States District Court
for the District of Kansas

MEMORANDUM AND ORDER

Plaintiff, proceeding in this action *pro se,* has filed an affidavit (Doc. #208) in which she moves to disqualify the undersigned judge from further service in this matter. Plaintiff also seeks a stay of this action. Having carefully reviewed the affidavit, I am now prepared to rule.

Plaintiff's instant motion is made pursuant to 28 U.S.C. § 144. This section provides a procedure whereby a litigant may seek recusal of a judge for "personal bias either against him or in favor of any adverse party." In order to effect recusal under this statute, the party must file a timely and sufficient affidavit stating the facts and reasons for his belief that prejudice exists, and the affidavit is to be accompanied by a "certificate of counsel of record" stating the affidavit is made in good faith.

Plaintiff's affidavit suggests that I am biased against her because she is Jewish. Plaintiff reaches this conclusion based on certain past

rulings made by the court in this case. The facts which give rise to plaintiff's affidavit can be summarized as follows. On March 5, 1984, the court directed the plaintiff to supplement certain answers to interrogatories that had been propounded by the individual defendants by March 30, 1984. On August 30, 1984, defendants filed a motion to dismiss pursuant to Fed.R.Civ.P. 37(b) for plaintiff's failure to supplement the interrogatories. Thereafter, a hearing was held on that motion on September 18, 1984. At the hearing, plaintiff, a practicing Jew, indicated that she would need forty-five additional days to supplement the interrogatories because of upcoming Jewish holidays. On September 19, the court, while believing that dismissal was indeed appropriate for plaintiff's failure to comply with this court's order of March 5, 1984, declined to grant defendants' motion and gave plaintiff another ten days in which to supplement the interrogatories. In that order, the court stated: "Failure to comply with this order will result in the dismissal of this action against the individual defendants." Therefore, on September 24, 1984, plaintiff filed a motion for a ten day extension of time to comply with the court's order. Plaintiff sought an additional ten days because of the Jewish holidays beginning on September 26 and continuing until October 7, 1984. On October 15, 1984, the court denied plaintiff's motion for an extension of time and dismissed the plaintiff's claims against the individual defendants. Plaintiff later moved for reconsideration of this order and that motion was denied on December 6, 1984. Plaintiff filed the instant affidavit on January 7, 1985.

Upon considering plaintiff's affidavit, the court is faced with the immediate problem of the lack of a certificate of counsel. It has been held that the lack of a certificate of counsel is sufficient ground for overruling a motion to disqualify since the certificate requirement is founded on the assumption counsel of integrity will not execute such a certificate in reckless disregard of the truth; hence the requirement is intended to protect against an obviously untruthful affidavit or an unjustified attempt by a party to disqualify the judge. *Morrison*

v. United States, 432 F.2d 1227 (5th Cir. 1970), *cert. denied*, 401 U.S. 945 (1971). Counsel are charged with an affirmative duty to undertake considerable deliberation and investigation as to whether the allegation in the affidavit are true, and cannot rest upon the mere word of his client. *United States v. Hanrahan*, 248 F.Supp. 471 (D.D.C. 1965). He must believe the facts alleged to be accurate and correct. *Duplan Corp. v. Deering Milliken, Inc.*, 400 F.Supp. 497 (D.S.C. 1975). In the present case plaintiff can of necessity furnish no certification of counsel, for she has no counsel at this time. Thus, the court believes that the lack of a certificate of counsel is sufficient to deny this motion. However, I do find an additional reason to deny the motion.

When a party has filed an affidavit alleging personal bias or prejudice on the part of a judge before whom a matter is pending, that judge has the obligation to determine if the affidavit is timely and sufficient. *Berger v. United States*, 255 U.S. 22 (1921); *United States v. Gigax*, 605 F.2d 507 (10th Cir. 1979). The affidavit is to be strictly construed against the party seeking disqualification. *Beland v. United States*, 117 F.2d 958 (5th Cir. 1941), *cert. denied*, 313 U.S. 585 (1940); *United States v. Cerrella*, 529 F.Supp. 1373 (S.D. Fla. 1982).

Section 144 requires that the affidavit of prejudice be "timely." Its specific provision that it be filed not less than ten days before the beginning of the term at which the proceeding is to be heard is no longer applicable since terms of court were abolished in 1963. *Andrews, Mosburg, Davis, Elam, Legg & Bixler, Inc. v. General Insurance Co.*, 418 F.Supp. 304 (W.D. Okla. 1976). The affidavit must now be filed with reasonable diligence. *United States v. Kelly*, 519 F.Supp. 1029 (D. Mass. 1981). Although plaintiff's affidavit was filed a month after this court's ruling on December 6, 1984, the court considers the affidavit timely filed.

An affidavit of prejudice, to be sufficient, "must give fair support to the charge of a bent of mind that may prevent or impede impartiality of judgment." *Berger v. United States, supra* at 33-34.

The court must take as true the facts set out in the affidavit. *Bell v. Chandler,* 569 F.2d 556 (10th Cir. 1978). However, the court need not accept the conclusions made by the affiant. *United States v. Bennett,* 539 F.2d 45 (10th Cir. 1976), *cert. denied,* 429 U.S. 925 (1976). Bias under § 144 must be personal to the party seeking disqualification as opposed to judicial in nature. *United States v. Bray,* 546 F.2d 851 (10th Cir. 1976). Adverse rulings or mere error by the court do not constitute sufficient basis for disqualification. *United States v. International Business Machines Corp.,* 529 F.Supp. 473 (S.D.N.Y. 1982).

Having carefully reviewed plaintiff's affidavit, I find it is insufficient to require disqualification under § 144. Plaintiff has reached the conclusion based on certain adverse rulings by the court in this case that I am anti-Semitic. The facts stated by plaintiff do not support any such conclusion. They fail to give fair support to the charge that I cannot impartially decide this case. The court has previously explained my order of October 15, 1984 and I do not find the need to do so again. Therefore, the court finds that plaintiff's affidavit which I shall construe as a motion for disqualification under 28 U.S.C. § 144 can be denied on this ground as well as the ground set forth previously in this opinion. Plaintiff's request for a stay of this action shall also be denied.

IT IS THEREFORE ORDERED that plaintiff's affidavit (Doc. #208) which the court has construed as a motion for disqualification under 28 U.S.C. § 144 be hereby denied.

IT IS FURTHER ORDERED that plaintiff's motion for a stay be hereby denied.

IT IS SO ORDERED.

Dated this 12th day of March, 1985, at Topeka, Kansas.

/s/ Richard D. Rogers
United States District Judge

APPENDIX D

(March 4, 1986)

DOROTHY WILLNER,
Plaintiff,

vs.

UNIVERSITY OF KANSAS,
Defendant.

Case No. 82-4291

In the United States District Court
for the District of Kansas

ORDER

This matter is presented before the court upon plaintiff's motion for reconsideration of this court's order of February 18, 1986. Having reviewed this motion, the court finds no reason to reconsider and reverse my order of February 18, 1986. Accordingly, plaintiff's motion for reconsideration shall be denied. In order to clear up any misunderstanding, I will affirmatively state that I am not related to any attorney who has appeared in this case or his/her spouse within the third degree. Finally, plaintiff's renewed motion for a stay shall be denied. This action shall proceed to trial on March 10, 1986.

IT IS SO ORDERED.

Dated this 4th day of March, 1986, at Topeka, Kansas.

/s/ Richard D. Rogers
United States District Judge

APPENDIX E

(September 19, 1984)

DOROTHY WILLNER,
Plaintiff,

vs.

UNIVERSITY OF KANSAS, et al.,
Defendants.

Case No. 82-4291

In the United States District Court
for the District of Kansas

ORDER

This matter is presented before the court upon the individual defendants' motion to dismiss. The court has heard oral argument and is now prepared to rule.

In this motion, the individual defendants contend that this action should be dismissed pursuant to Fed.R.Civ.P. 37(b) for plaintiff's failure to comply with the court's order of March 5, 1984. In that order, Judge Van Bebber granted defendants' motion to compel in part and directed the plaintiff to supply more complete and detailed answers to defendants' interrogatories nos. 1, 2, 3, 5, 9, 10 and 11 on or before March 30, 1984. Defendants contend that five months have elapsed since Judge Van Bebber's order and plaintiff has not submitted any supplemental answers. Plaintiff has responded that certain circumstances, not of her own doing, occurring between March 5, 1984 and August 16, 1984 led to her failure to submit the supplemental answers to the interrogatories. Further, plaintiff

contends that the answers she provided in her deposition during the months of July and August sufficiently answer the interrogatories propounded by the defendants.

Dismissal is an undeniably drastic measure which should not be used indiscriminately. Dismissal under Rule 37 is justified only when the litigant's failure to comply with proper discovery constitutes willfulness, bad faith, or gross negligence. *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639 (1976) *(per curiam)*. After carefully considering the circumstances of this case, the court shall not dismiss this action. However, the court does agree with defendants that the interrogatories remain incomplete and that plaintiff needs to supplement her answers. In spite of the various problems articulated by the plaintiff, the court finds that plaintiff has been given a great deal of time to answer these interrogatories. Therefore, the court shall provide the plaintiff with but ten days to comply with Judge Van Bebber's order of March 5, 1984. Plaintiff shall submit supplemental answers to interrogatories nos. 3, 5, 9, 10 and 11. These answers should be detailed and complete and simply attaching xeroxed pages from the deposition will not suffice. Failure to comply with this order will result in the dismissal of this action against the individual defendants.

The court recognizes that this lawsuit might be a burden to the plaintiff. However, plaintiff must recognize that it is also a burden to the defendants. The court owes an obligation to all litigants, including the defendants, to see that cases are prosecuted diligently and without delay. Plaintiff has initiated this action and she must expect to prosecute it. This prosecution will take place at the court's direction, pursuant to the local rules and the Federal Rules of Civil Procedure, and not at the ultimate convenience of the plaintiff. The court hopes that this order will result in moving this case to its conclusion.

IT IS THEREFORE ORDERED that the individual defendants' motion to dismiss be hereby denied.

IT IS FURTHER ORDERED that plaintiff submit supplemental answers to interrogatories nos. 3, 5, 9, 10 and 11 to the defendants within ten days of the date of this order.

IT IS SO ORDERED.

Dated this 19th day of September, 1984, at Topeka, Kansas.

/s/ Richard D. Rogers
United States District Judge

Supreme Court, U.S.
FILED
DEC 27 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-951

In The
Supreme Court of the United States
October Term, 1988

—o—

DOROTHY WILLNER,

Petitioner,

vs.

UNIVERSITY OF KANSAS, GENE BUDIG, ARCHIE R. DYKES, DELBERT M. SHANKEL, FRANCES D. HOROWITZ, ROBERT P. COBB, DEANELL TACHA, ROBERT L. LINEBERRY, ROBERT S. HOFFMAN, ROBERT J. SQUIER, ANTA MONTET-WHITE, ALFRED E. JOHNSON, MICHAEL CRAWFORD, JOHN M. JANZEN, F. ALLAN HANSON, FELIX MOOS, DAVID FRAYER, ROBERT J. SMITH, DONALD STULL,

Respondents.

—o—

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

—o—

REPLY BRIEF FOR PETITIONER

—o—

DOROTHY WILLNER
Pro Se
2112 Terrace Road
Lawrence, Kansas 66044
(913) 843-4442

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

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No. 88-951

In The

Supreme Court of the United States

October Term, 1988

DOROTHY WILLNER,

Petitioner,

vs.

UNIVERSITY OF KANSAS, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITIONER'S REPLY BRIEF

I

In *Liljeberg v. Health Services Corp.*, — U.S. —, 108 S.Ct. 2194, 100 L.Ed.2d 855, this Court upheld the disqualification under 28 U.S.C. § 455 of a trial judge who had served as a university trustee where the university was involved in dealings with a party. This Court also upheld vacatur when the motion to recuse had been made approximately ten months after judgment had been entered, since the motion to vacate had been promptly filed.

The standard mandated by *Liljeberg* applies to the instant case. *See* Pet. 11-12. Judge Rogers was a member

of one of respondent University of Kansas' governing bodies, the Board of Governors of its Law School, while this case was before him. Respondents' allegation that petitioner sought Judge Rogers' disqualification because of a position in "the KU Law Society" (Resp. Br. 8) is false on face of the record which respondents themselves have appended (Resp. Br. App. A17).

Respondent KU's own procedures, specified in its *Handbook for Faculty and Other Unclassified Staff,* calls on members of its Law School to consider and decide personnel matters throughout the University. They serve on its Judicial Board which mediates in cases where the University brings charges against its employees including tenured faculty to the prejudice of their employment. The Judicial Board also hears disputed cases of promotion, appointment, reappointment and non-reappointment of faculty. *See* App. 1-4, *infra.*

The record already before this Court shows that Judge Rogers' findings against petitioner after her trial before him under the Equal Pay Act and Title VII laid the basis for KU to bring charges against her to alter or terminate her employment. *See* Pet. App. A61, A133-135. Judge Rogers thereby involved members of KU's Law School in prospective prejudicial personnel decisions against her.

It is indisputable that petitioner timely sought the disqualification of Judge Rogers. *See* Pet. 7-8.

Adams v. United States, 302 F.2d 307, 309 (5th Cir. 1962), which respondents cite, is inapplicable not only because it is moot but also because the facts differ. In

Adams, disqualification of the trial judge was not sought during trial or on first appeal. In contrast, petitioner herein timely sought the disqualification of Judge Rogers before trial.

Smith v. Danyo, 585 F.2d 83, 86 (3d Cir. 1978), which respondents cite and quote (Resp. Br. 4-5) supports petitioner. In *Danyo,* where the issue of timeliness was limited to disqualification under § 144, the Third Circuit stated at 86

> . . . when the circumstances giving rise to the charge of bias occur or are discovered after the case has commenced, timeliness should be measured not in some absolute and arbitrary manner from the date of discovery but with respect to the future stages of the case . . .

Since some circuits have chosen to treat § 455 as if it were identical to § 144 in its timeliness requirement, *Danyo* adds to the evidence of disarray in the circuits on the issue of timeliness.

Respondents misconstrue the holding of the Fifth Circuit in *Delesdernier v. Porterie,* 666 F.2d 116, 121, 122 (5th Cir. 1982), *cert. den.,* 459 U.S. 839 (1982), which they cite (Resp. Br. 4, 5). The Fifth Circuit stated in *Delesdernier* at 121 "that timeliness may not be disregarded in *all* cases regarding disqualification under § 455(a)" (emphasis provided). The Fifth Circuit found the specific facts of *Delesdernier* "well suited to a timeliness requirement," since "the trial judge raised the possibility of disqualifying himself at the very beginning" and "before trial began gave a full and fair disclosure . . ." The contrast with the facts of the instant case could not be more com-

plete. *Delesdernier* either is inapplicable or else it supports petitioner.

The cases of *Parrish v. Board of Commissioners of Alabama State Bar,* 525 F.2d 98 (5th Cir. 1975) (*en banc*), *cert. den.,* 425 U.S. 944 (1976), and *Brody v. President & Fellows of Harvard College,* 664 F.2d 10 (1st Cir. 1981), *cert. den.,* 455 U.S. 1027, 102 S.Ct. 1731, 72 L.Ed.2d 148, cited by respondents (Resp. Br. 8-9), are also inapplicable. The activities of the judge in Parrish found insufficient for disqualification included no more than presidency of the county bar association of Montgomery County and acquaintanceship or friendship with witnesses and defense counsel. The judge in *Brody* was no more than an alumnus or graduate of Harvard College.

Respondents falsely allege that "now for the first time petitioner presents . . . the new allegation that the district judge served as a director of the University of Kansas Endowment Association . . ." (Resp. Br. 2). The record already before this Court shows that petitioner alleged this on June 16, 1988, in her Petition for Rehearing in Appeal No. 86-2678 (*See* Pet. 8, A136), having earlier alleged this in oral argument before the Tenth Circuit on December 15, 1987. Respondent KU's Endowment Association not only has officers, committees, trustees and advisory trustees. It also has various fund-raising programs which have their own officers, boards and bodies drawn, *inter alia,* from KU's alumni and alumnae. On September 21, 1986, when Myra Hinman disclosed to petitioner that Judge Rogers was a director of KU's Endowment Association, she did not state the specific program and year he served. Although the Tenth Circuit ruled in

Hinman v. Rogers, 831 F.2d 937, 940 (10th Cir. 1987) that "the allegations in the recusal requests do not support the claim that the judge has a financial interest" in respondent KU's Endowment Association, it failed to take cognizance of Judge Rogers' strong personal interest in fundraising efforts for respondent KU.

II

Respondents err on face of record in arguing that there is no merit in petitioner's claim that the district court created a burden on the exercise of her religion by its order of September 19, 1984 (*See* Res. Br. A24-A26). It is incontestable that Jewish religious observance required petitioner to abstain from all work from (a) sundown of September 26, 1984 to nightfall of September 28, 1984 (the two days of Rosh HaShana), (b) sundown of September 28, 1984, to nightfall of September 29, 1984 (Sabbath of Penitence), (c) from sundown of October 5, 1984, to nightfall of October 6, 1984 (Yom Kippur and Sabbath). It is incontestable that petitioner had apprised the district court on two separate occasions prior to the date it issued its order of September 19, 1984, of her commitment to Judaism. She did so in a motion filed September 12, 1984 (*See* App. 8-9, *infra*). She did so again during the hearing of September 18, 1984. On September 18, 1984, she also apprised the district court that the solemn Jewish High Holy Days period was approaching. On September 21, 1984, prior to receipt of the Court's order of September 19, 1984, she provided the Court with the specific dates of the Jewish High Holy Days period (*See* Pet. A99). On September 24, 1984, as soon as possible after receipt of the Court's order of September 19,

1984, she *filed* a motion requesting a ten day extension of said order because

> "Rosh HaShana, the Jewish New Year, falls on September 26 through 28 followed by the Sabath between Rosh HaShana and Yom Kippur, the Day of Atonement."

She again stated that she is devout.

In 1984, Judaism was not an obscure cult in the United States. Temple Beth Sholom already existed in Topeka in 1966 when petitioner began teaching at respondent University. Respondent KU had by 1984 already taken notice of the Jewish High Holy Days. Respondents err in alleging that the Jewish High Holy Days require presence in synagogue (Resp. Br. 11).

Contrary to erroneous statements by the Tenth Circuit, petitioner did not have "ample time to comply with the Court's order prior to the commencement of her religious observances" (*See* Pet. A8). On the contrary, the district court knowingly allowed her no more than *four* days between September 22, 1984 (*See* F.R.Civ.P. 6(a) and (e)) and sundown, September 26, 1984, to supplement her answers to respondents' interrogatories before the onset of Rosh HaShana. Moreover, September 22, 1984 was the Sabbath preceding Rosh HaShana. The district court also knew that petitioner had full-time teaching obligations in connection with her employment; yet its order of September 19, 1984, specifically prohibited her from supplementing her answers to interrogatories by xeroxing and attaching the pertinent pages of her deposition. *See* Opp. Br. 25-26.

Respondents argue (Opp. Br. 11) that "the crux of a First Amendment freedom of religion claim is a governmentally imposed pressure on a person to forego the practice of a faith in such way that the person is forced to choose between following the precepts of the religion and complying with the requirements set by the state." Respondents could not more accurately describe the burden of choice unreasonably put on petitioner. The judiciary incontestably is one arm of the government. The district court's order of September 19, 1984 imposed pressure which forced petitioner to choose between observing Rosh HaShana, the Sabbath of Penitence and Yom Kippur according to the practice of her faith and supplementing respondents' interrogatories in "but ten days" (Opp. Br. A25). This Court's holdings in *Sherbert v. Verner,* 374 U.S. 398, 404, 83 S.Ct. 1790, 10 L.Ed. 2d 965, 970 (1963) and *Abington School District v. Schempp,* 374 U.S. 203, 223, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963) support petitioner.

United States v. Fisher, F. Supp. 1236 (S.D.N.Y. 1983), cited by respondents (Opp. Br. 12), is inapplicable to the instant case in the light of the different fact situations. In *Fisher,* the compelling state interest which weighed against the request not to hold trial on Fridays was the burden this would put on six other defendants and a jury. In contrast, the instant case still was in the discovery stage when the district court entered its order of September 19, 1984, and it failed to assert a compelling reason or one not otherwise serving to overbalance petitioner's legitimate claim to the free exercise of religion. *See Wisconsin v. Yoder,* 406 U.S. 205, 215, 92 S.Ct. 1526,

1533, 32 L.Ed.2d 15 (1972), cited in *Fisher* at 1238. Furthermore, the Tenth Circuit as well as the district court failed to assert any overriding or compelling state interest to warrant the coercive effect of the district court's orders as they operated against petitioner in the practice of her religion. *See Abington, supra.*

United States v. Thomas, 757 F.2d 1359 (2d Cir. 1985), *cert. den.,* 373 U.S. 819 (1985), cited by respondents (Opp. Br. 12), supports petitioner. The Second Circuit held that, under the "collateral order" exception to the final judgment rule, the decision to hold trial on Fridays should have been appealed immediately after the trial court entered its order. According to this standard, petitioner properly appealed the trial court's order of October 15, 1984 (Pet. A26-A29) as a final order (*See* App. 10-11, *infra*).

Roadway Express, Inc. v. Piper, 447 U.S. 752, 763, 100 S.Ct. 2455, 65 L.Ed.2d (1980), cited by respondents (Opp. Br. 12), is inapplicable. This Court found in *Roadway* at 499 that the respondents in that case never complied with the district court's order to answer Roadway's interrogatories. In contrast, the petitioner in this case complied with the district court's order of September 19, 1984 to supplement interrogatories as ordered absent four days of abstention from work in the exercise of her religion. The record already before this Court (Pet. 8; A113-117) disproves respondents' untrue allegations (Opp. Br. 12) of willfulness and unjustified default after petitioner's receipt of the Magistrate's order of March 5, 1984.

National Hockey League v. Metropolitan Hockey Club, 427 U.S. 639, 642, 96 S.Ct. 2778, 49 L.Ed.2d 747 (1976),

cited by respondents (Opp. Br. 12), supports petitioner. This Court held at 641-642 that the district court was required to consider the full record in determining whether to dismiss for failure to comply with discovery orders. The full record establishes petitioner's complete good faith (*See* Pet. A105-A118).

The courts below have so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

Respectfully submitted,

DOROTHY WILLNER
Pro Se
2112 Terrace Road
Lawrence, Kansas 66044
(913) 843-4442

APPENDIX A

University of Kansas Handbook for Faculty and Other Unclassified Staff. Page 45

* * *

c. If inadequate consideration in terms of the established *criteria* is alleged, *the case can go to mediation (Part II)*. The Committee on Mediation may, if it sees fit, seek reconsideration by appropriate bodies of the decision not to reappoint, but it may not substitute its judgment on the merits of the case. There is no provision for formal hearings. (Emphasis added)

2. Dismissal or termination of appointment of a nontenured faculty member *prior* to the end of his or her term of appointment; *dismissal or termination of a tenured faculty member.* These cases can go to mediation (Part II) and to formal hearings (Part III); the Chancellor is the charging party and the burden of proof is on him or her. If a faculty member alleges that he or she was dismissed in violation of academic freedom, the provisions of Part III shall apply. (Emphasis added)

3. Violation of academic freedom that does not involve dismissal of a tenured faculty member or of a nontenured faculty member during his/her term of appointment. The case can go to mediation (Part II) and if necessary to formal hearing (Part IV); in formal hearings the burden of proof is on the faculty member.

As a final clarification, it should be noted that the University Senate Code (Article XV, Section 3) gives the Committee on Tenure and Related Problems "original jurisdiction" within the University "over any claim . . . by a member of the faculty that an administrative action constitutes (i) a violation of the tenure rights of a tenured

member of the faculty; (ii) a termination without proper cause of the services of a non-tenured member of the faculty prior to the end of the term of his/her appointment; (iii) a violation of established University procedures for the appointment, promotion or reappointment of a tenured or non-tenured faculty member or the non-reappointment of a non-tenured member of the faculty; (iv) a violation of the academic freedom of a tenured or non-tenured member of the faculty; (v) a censure, suspension or dismissal pursuant to Article VI of the Faculty Code of Conduct without proper cause; or (vi) the placing of a faculty member on administratively determined Leave Without Pay pursuant to Article IV of the Faculty Code of Conduct without proper cause." For dismissals resulting from a formal declaration of a state of Financial Exigency, the procedures set forth in Article VII of the "Rules and Regulations of the University Senate" apply and in cases of conflict take precedence over the procedures described below.

Part II: Mediation Procedures

For the mediation phase the chairperson of the *Judicial Board* shall, upon request of the chairperson of the Committee on Tenure and Related Problems, establish a mediation panel as provided for in the University Senate Rules and Regulations 5.3.3, 6.6.1.3, and 6.6.1.4. Such mediation panel shall proceed as provided for in the University Senate Rules and Regulations 6.6.1.4, except that its report shall be rendered to the chairperson of the Committee on Tenure and Related Problems. The mediation phase may neither be waived nor omitted. (Emphasis added)

* * *

ganizational entity rather than the unit; appeal could then be made to the Judicial Board.

5.2.3 *Review and Approval.* Any organizational entity or unit that has developed a grievance procedure shall submit it to the General Counsel of the University. Unless the General Counsel determines that the procedure as submitted is in conflict with existing law, rules of the Board of Regents, or rules or regulations of the University, it shall become effective thirty calendar days after such submission.

5.2.3.1 Any unit which has elected to place itself under the grievance procedure of the respective larger entity shall report this election in writing to the chairperson of the Judicial Board, with information copies to the General Counsel of the University, the Office of Affirmative Action, and the University Ombudsman.

5.2.4 *Dissemination of Information.* Information concerning the procedure adopted by a unit shall be be easily available to all persons employed in or using the services of the unit. Copies of the procedures shall also be placed on file in the Office of Affirmative Action, with the University Ombudsman, and the chairperson of the Judicial Board, and shall upon request be made available to the administrators of other University units.

5.2.5 *Change and Amendments.* Any change of or amendment to a grievance procedure shall be subject to review and approval as provided in 5.2.3, above, and updated copies disseminated as provided in 5.2.4, above.

Section 3. *The Judicial Board*

5.3.1 *Chairperson.* The *law member* serving in his or her third or final year as member of the Judicial Board shall serve as chairperson of the Board. If, by reason of absence, disability or disqualification, the chairperson is unable to serve, the *law member* next senior in terms of service on the Judicial Board shall assume the chairperson's *duties.* (Emphasis added)

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

DOROTHY WILLNER, Plaintiff,	)	
v.	)	Case No. 82-4291
UNIVERSITY OF KANSAS, et al. Defendants.	)	

PLAINTIFF PRO SE'S REQUEST FOR RECONSIDERATION

(Filed Sept. 12, 1984)

COMES NOW plaintiff pro se Dorothy Willner and, pursuant to instructions from the Court transmitted by the Clerk on August 31, 1984, respectfully requests the Court to reconsider its dismissal of her claims under 42 U.S.C. 1981. In support hereof, plaintiff states:

1. On December 14, 1983, she asked for additional time to reply to defendants' Motion to Dismiss.

2. Although the Court granted plaintiff's motion, as stated by Honorable Richard D. Rogers in a footnote on p. 2 of his Memorandum and Order of August 29, 1984, plaintiff pro se had not, in fact, received a copy of said Order granting plaintiff's motion of December 14, 1983. Plaintiff was not apprised of the Minute Order granted by Judge Rogers and filed on December 22, 1983, until she received the Memorandum and Order filed August 30, 1984.

3. In support of her request to the Court to reconsider her claims under 42 U.S.C. 1981, plaintiff again brings forward the facts referred to in paragraph 7 of her Complaint, said facts having been previously set forth in her charges to the Equal Employment Opportunity Commission, charges for which said federal agency after due investigation found probable cause.

4. Plaintiff's charges to said federal agency included retaliation by defendant University and individual defendants because plaintiff protested a violation of defendant University's contract with the Kansas Commission on Civil Rights. One of the original petitioners to the Kansas Commission on Civil Rights (See Exhibit A, letter of Frank L. Ross to plaintiff dated August 4, 1976) for the investigation (KCCR Case No. I-16-73) which resulted in the Agreement signed by Archie Dykes, then Chancellor of defendant University, and by Anthony D. Lopez in June and July of 1976 (See Exhibit B), plaintiff pro se protested a violation of said agreement in Spring 1977 by defendant University and individual defendants. Said violation involved the appointment of defendant Stull, a white male, to a tenure track position in defendant University without said position having been duly advertised (See Exhibit C, plaintiff's letter to Bonnie Ritter of the Office of Affirmative Action of defendant University dated May 16, 1977).

5. Plaintiff's protest was taken on behalf of minority groups members of which could have applied for said position had it been duly advertised. Plaintiff personally knew one Native American woman anthropologist and one Black male anthropologist qualified for said position who almost certainly would have applied for it, had it been

advertised in conformity with the provisions of the Agreement between the University of Kansas and the Kansas Commission on Civil Rights.

6. Plaintiff was reprised against for her protest by all members of the Department of Anthropology then in residence led by defendants Squier and White in a faculty meeting called for said purpose held on May 19, 1977 (see Exhibit D, Minutes of Faculty Meeting of May 19, 1977; and Exhibit E, plaintiff's own notes on said faculty meeting). Said meeting was held with the full knowledge of and acceptance by administrators of defendant University, plaintiff having appealed to defendant Horowitz to intervene and having appealed in vain. Said violation was later investigated by the Kansas Commission on Civil Rights (see Exhibit F, letter of William V. Minner to plaintiff of March 3, 1978). Reprisals against plaintiff stemming from this fact situation have continued to the present.

7. Plaintiff advanced claims under 42 U.S.C. 1981 in her original Complaint. She now asks that these claims be reconsidered on the basis of the fact situation just reviewed, said facts establishing a nexus between the protected activity under 42 U.S.C. 1981 and the retaliatory actions. Under 1981 "all persons" protected can include white persons. *McDonald v. Santa Fe Trail Transp. Co.* (1976), 427 U.S. 273, 49 L.Ed.2d 493, 96 S.Ct. 2574. Furthermore, the Supreme Court has held in *Sullivan v. Little Hunting Park,* 396 U.S. 229, 90 S.Ct. 400, 24 L.Ed.2d 386 (1969), that a white person who has been . . . punished for trying to vindicate the rights of non-white) minorities . . ." has standing to sue under 1981. See also *De Matteis v. Eastman Kodak Co.* (1975, CA 2 NY), 511 F.2d 306, on

reh (CA2 NY) 520 F.2d 409. Also supporting the claim that non-blacks have standing to maintain a 1981 action for injuries they suffer as a result of discrimination aimed at blacks is *Riccobono v. Whitpain Township* (1980, ED Pa), 497 F.Supp. 1364. Furthermore, the Court of Appeals for the Eighth Circuit has ruled that a claim of employment discrimination based upon retaliation is cognizable under 1981. *Sisco v. J. S. Alberici Constr. Co.* (1981, CA8 Mo), 655 F.2d 146, cert. den. (U.S.) 71 L.Ed.2d 688, 102 S.Ct. 1485; accord, *Goff v. Continental Oil Co.* (1982, CA5 Tex), 678 F.2d 593, on remand (S.D. Tex.) 31 BNA FEP Cas 417, 31 CCH EPD 33442; *London v. Coopers & Lybrand* (1981, CA9 Cal.), 644 F.2d 811; *Setser v. Novack Invest. Co.* (1981, CA8 Mo.), 638 F.2d 1137, amd, en banc (CA8 Mo.) 657 F.2d 962, cert. den. (U.S.) 70 L.Ed.2d 601, 102 S.Ct. 615.

8. Plaintiff pro se also respectfully brings before the Court the fact that Hasidic Jews are now considered by the Federal Government to be a disadvantaged minority, joining six other groups in that category including Blacks, Native Americans, Eskimos, Aleuts, Puerto Ricans and Spanish-Speaking Americans. Hasidic Jews observe Jewish law and ritual in a fashion which renders them highly visible in general American society. Plaintiff herself is not a Hasidic Jew, although relatives in the past and friends in the present fall within this class. Nonetheless, plaintiff is prepared to argue before the Court, from her expert status as a cultural anthropologist, that it is the group definition of a person and of the person's class membership which renders said person a visible member of a minority group. Plaintiff claims that her commitment to Judaism and her research in and identification

with the State of Israel have given her the same visible minority status as a Jew in the Anthropology Department of defendant University as that of Hasidic Jews in the larger society. Plaintiff's commitment to vindicating the rights of all minorities, including Blacks and Native Americans, derives, in part, from her cultural heritage and personal knowledge of the discrimination to which Jews, as well as Blacks and other protected minorities under Federal law, have been subjected.

WHEREFORE, plaintiff pro se prays the Court to restore her claims under 42 U.S.C. 1981.

/s/ Dorothy Willner
Dorothy Willner
Plaintiff pro se
2112 Terrace Road
Lawrence, Kansas 66044
(913) 843-4442

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

DOROTHY WILLNER,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
UNIVERSITY OF KANSAS,	)	
ARCHIE R. DYKES,	)	Civil Action, File
DELBERT M. SHANKEL,	)	No. 82-4291
FRANCES D. HOROWITZ,	)	
ROBERT P. COBB,	)	Notice of Appeal
ROBERT S. HOFFMAN,	)	
ROBERT J. SQUIER,	)	
ANTA MONTET WHITE,	)	
FELIX MOOS, JOHN M.	)	
JANZEN, MICHAEL	)	
CRAWFORD, DAVID	)	
FRAYER, DONALD STULL,	)	
	)	
Defendants.	)	

(Filed Dec. 26, 1984)

Notice is hereby given that Dorothy Willner, the plaintiff above named, hereby appeals to the United States Court of Appeals for the Tenth Circuit from the final orders of the District Court of Kansas at Topeka, Kansas, entered on the 15th day of October, 1984 and the 6th day of December, 1984, denying plaintiff's motion for a ten day extension of time to supplement interrogatories in order that plaintiff observe the Jewish High Holy Days of Rosh HaShana, the Jewish New Year, Yom Kippur, the Day of Atonement, and the Sabbath between Rosh

HaShana and Yom Kippur with their requirement that persons of the Jewish faith abstain from all work and engage in prayer and repentance. Plaintiff is a practicing Jew and, therefore, was bound to observe properly the aforesaid High Holy Days in the manner specified by the tenets of her religion. Dated this 26th day of December, 1984.

/s/ Dorothy Willner
Dorothy Willner
Plaintiff pro se
2112 Terrace Road
Lawrence, Kansas 66044
(913) 843-4442